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# UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,

vs.

UNITED STATES OF AMERICA.

## Statement.

2 This action was commenced by petition dated November 30, 1931. It is an action brought by Newton W. Lumbra, plaintiff, against the United States of America, defendant. The petition was served on the United States Attorney, Burlington, Vermont, on December 8, 1931, and a copy of the petition was mailed, registered, to the Attorney General of the United States, Washington, D. C., on January 13, 1932.

3 The answer of the defendant was filed on February 5, 1932.

The trial of this case was commenced on April 18, 1932, before Honorable Harland B. Howe, District Judge, and a jury, and was concluded on April 20, 1932.

On April 20, 1932, the defendant moved the Court at the close of all the evidence, to direct a verdict for the defendant, and on the same date, the motion was denied.

On April 28, 1932, the Court extended the term for a period of three months.

On April 28, 1932, judgment on the verdict was entered for the plaintiff.

On July 27, 1932, the defendant filed its petition for appeal, together with its Bill of Exceptions and Assignment of Errors.

On August 17, 1932, the defendant filed a Supplemental Assignment of Errors.

---

## Petition.

UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,

vs.

UNITED STATES OF AMERICA.

Now comes Newton W. Lumbra of St. Albans in the County of Franklin, District of Vermont, who respectfully shows that he was a soldier in the U. S. Army during the World War, so-called, from July 14, 1917 until about April 29, 1919. And your petitioner further shows that during said service he was duly insured by the U. S. Government under a War Risk Insurance Policy,

duly issued by said U. S. Government and said 7
policy was in effect and paid for at the time of
petitioner's discharge from the U. S. Army.

Your petitioner further shows that during said Army service and while with the 26th Division (Yankee Division) in France, he was seriously injured by the exploding of a high explosive shell whereby he was thrown a great distance and rendered unconscious and was severely bruised and injured about the body in that he received a broken ankle and other serious injuries. And 8
your petitioner further shows that by reason of being so thrown by said high explosive shell he was confined in hospitals for a long period of time and developed thereafter a brain or nerve trouble sometime known and commonly understood as shell shock. And your petitioner further shows that after said hospitalization he was later returned to his outfit 103 Machine Gun Battalion, but by reason of the disability he was suffering as a result of the injury above described he was left in a badly shattered nerve condition 9
and was unable to carry on as a full duty soldier with his said outfit but was kept on light duty where little or no work was required during the remainder of the period that his outfit remained in France and up to the time of his discharge from said U. S. Army on the 29th of April, 1919.

And your petitioner further shows that by reason of said injury resulting in said brain or nerve trouble as above set forth that he was suffering the effects of said injury at the time of his discharge from the U. S. Army and was totally dis-

10 abled at the date of his said discharge from the U. S. Army from an occupational standpoint. Your petitioner further says that in view of the medical treatment which he has undergone and the fact that his disability has continued from the date of his injury, down to and including the present date, and that it indicates no sign of improvement or cure, that his present condition and his condition since date of discharge is a permanent disability and will continue and will be permanent and therefore his disability at the present
11 time and at all times from date of injury received by him in service and since date of discharge has been a permanent and total disability.

Your petitioner further says that by reason of the fact that he was totally and permanently disabled at the time of his discharge from the U. S. Army that his said War Risk Insurance Policy thereupon became due and payable and he further says that the complete evidence of this permanent and total disability, which caused said
12 policy to become payable was presented to the U. S. Veterans Bureau and a claim for payment of the same and of the sums then and there due and payable under said War Risk Insurance Policy, was properly made by your petitioner to said War Risk Insurance Bureau. And your petitioner further says that although proper evidence has been submitted establishing the right to such payment and proper demand has been made therefore nevertheless the U. S. Government has neglected and refused to recognize said insurance policy and the petitioner's rights to

payment thereon and has refused to pay over to 13
your petitioner such sums of money as have become due since the date of your petitioner's permanent and total disability, to wit from April 29, 1919 up to and including the present date. Your petitioner further says that the U. S. Government in refusing and neglecting to pay your petitioner such sums of money as have become due under said War Risk Insurance Policy, following the submission of proper evidence of permanent and total disability since April 29, 1919, is without right and contrary to law; your petitioner 14
further claims that at the present time he is permanently and totally disabled as a result of his service in the U. S. Army and has been permanently and totally disabled since the date of the injury received by him in France, to wit, June 17, 1918. Your petitioner further claims that the refusal and neglect of the U. S. Government to pay him such sums of money as are legally due him under said War Risk Insurance Policy is a great damage to him, to wit, the sum of Ten thousand ($10,000.00) Dollars, to recover which, with 15
just costs, the petitioner brings suit.

Dated at Burlington, in the County of Chittenden, this 30th day of November, A. D. 1931.

(Sd.) NEWTON W. LUMBRA.

(Sd.) J. A. McNamara became recognized for costs in the above action as the law directs.

Before me,
(Sd.) Harold Sylvester,
Notary Public.

*Petition.*

State of Vermont,
Chittenden County. } ss.:

At Burlington in said County this 30th day of November, A. D. 1931, personally appeared before the undersigned authority, NEWTON W. LUMBRA, the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations made in the foregoing petition, says that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated to be on information and belief, and as to those he believes them to be true.

Before me,

(Sd.) HAROLD SYLVESTER,
Notary Public.

---

United States of America,
District of Vermont. } ss.:

At Burlington, in said District, on the 5th day of December, A. D. 1931, I made service of this petition by delivering to the Honorable Harry B. Amey, United States Attorney within and for the District of Vermont, a true and attested copy thereof with this my return hereon thereon endorsed.

Attest,

A. W. HARVEY,
United States Marshal.
by H. F. WAKEFIELD,
Deputy U. S. Marshal.

*Affidavit.*

| | | |
|---|---|---|
| Travel | .06 | 19 |
| Service | 2.00 | |
| | $2.06 | |

Endorsed:
Filed December 2, 1931,
A. Myrl Blakely,
Deputy Clerk.

---

**Affidavit.**

U. S. DISTRICT COURT. 20

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
U. S. OF AMERICA.

I, J. A. McNamara, attorney for Newton W. Lumbra, plaintiff in the above entitled case, on oath depose and say as follows:

On the 8th day of December, 1931 a copy of the 21
petition in the above entitled suit was duly served by the U. S. Marshal, within and for the District of Vermont, on Harry B. Amey, U. S. District Attorney, within and for the District of Vermont, and on the 13th day of January, 1932 a copy of said petition was mailed to the Attorney General of the United States at Washington, D. C. under registered mail with return receipt requested. The return receipt is hereunto attached and made a part hereof.

*Defendants' Answer to the Petition.*

Dated at Burlington this 23rd day of January, 1932.

J. A. McNAMARA.

Subscribed and sworn to before me this 23rd day of January, 1932.
Francis D. Foley,
Notary Public.

Return receipt from Department of Justice dated January 15, 1932 attached.

Filed January 23, 1932,
A. Myrl Blakely,
Deputy Clerk.

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## Defendant's Answer to the Petition.

IN THE
DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF VERMONT.

| | |
|---|---|
| NEWTON W. LUMBRA, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant. | Law No. 816. |

Now comes the defendant, the United States of America, by its attorney, Allen Martin, Assistant United States Attorney in and for the District of Vermont, and makes answer to the plaintiff's petition as follows:

*Defendants' Answer to the Petition.*

Defendant is without information as to plaintiff's legal residence and therefore denies the allegation regarding same. 25

The allegation as to military service of plaintiff is admitted.

It is admitted that during his military service plaintiff was granted war risk insurance, which was in force at the date of his discharge, but it is denied that an insurance policy was issued. 26

The allegations of the second grammatical paragraph of the petition have been made the subject of a Motion to Strike.

It is denied that plaintiff was at the time of his discharge from military service, or has been at any time since that date, permanently and totally disabled, thereby maturing his contract of war risk term insurance.

It is admitted that plaintiff has made demand for the payment of insurance benefits, that such demand has been refused, and that a disagreement exists between plaintiff and defendant. 27

It is denied that plaintiff has been permanently and totally disabled at any time while his contract of war risk insurance was in full force and effect.

Wherefore defendant, having fully answered, prays that said petition may be dismissed and that the United States may have such other and

28 further relief as seems just and proper in the premises.

....., United States Attorney.

ALLEN MARTIN, Assistant United States Attorney.

WILLIAM J. HESSION, Insurance Attorney Veterans Administration.

Filed February 5, 1932,
Austin H. Kerin,
29 Clerk.

---

## Motion for Directed Verdict.

UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA. } No. 816.

30

Now comes the defendant in the above entitled action, at the close of all the evidence, and moves for a directed verdict in its favor on the ground that upon all the law and the evidence in this case the plaintiff is not entitled to recover, for the reason that plaintiff has not proved he was permanently and totally disabled on or before May 31st, 1919, and that the evidence introduced in the case is insufficient to support a finding that

the plaintiff was permanently and totally disabled 31
on or before the 31st day of May, 1919.

HARRY B. AMEY,
United States Attorney
For the District of Vermont.

By
FRANCIS J. FITZGERALD,
Assistant Insurance Attorney.

Filed April 20, 1932,
Austin H. Kerin, Clerk.
By Arnold A. Murray, 32
Deputy.

---

## Verdict for Plaintiff.

| | |
|---|---|
| NEWTON W. LUMBRA,<br>vs.<br>UNITED STATES OF AMERICA. | Civil No. 816. |

In this cause the jury on their oath say that 33
the defendant is liable in manner and form as the plaintiff in his declaration hath alleged and find for the plaintiff to recover from the defendant $57.50 a month from May 31, 1919, to March 31, 1932, inclusive, being 155 months and amounting to the sum of $8,912.50.

DANIEL M. ST. GEORGE,
Foreman.

Filed April 20, 1932,
Arnold A. Murray,
Deputy Clerk.

## Judgment.

34 UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

| | |
|---|---|
| NEWTON W. LUMBRA,<br>vs.<br>UNITED STATES OF AMERICA. | At Law<br>No. 816. |

ORDERED that judgment be entered on the
35 verdict in this case for the plaintiff to recover from the defendant $57.50 a month from May 31, 1919, to March 31, 1932, inclusive, being 155 months, and amounting to the same of $8,912.50.

Dated at Burlington, Vermont, April 28, 1932.

HARLAND B. HOWE,
United States District Judge.

Filed April 28, 1932,
Austin H. Kerin,
36 Clerk.

## Judgment Order.

UNITED STATES DISTRICT COURT. 37

DISTRICT OF VERMONT.

| | |
|---|---|
| NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA. | No. 816, March Term, 1932. |

And now if is further adjudged that J. A. McNamara of Burlington, County of Chittenden, 38
State of Vermont, attorney of record for the plaintiff, be paid as a reasonable attorney fee the sum of ten per cent of the amount of the judgment recovered herein, amounting to $891.25, (and that he be paid the sum of $361.80 as and for his reasonable and necessary disbursements in and about the preparation and trial hereof, which are fully set forth in the schedule filed in the motion for said allowance); and that he receive nothing from any future payments of the insurance on which this suit is based. 39

Done in Court at Burlington this 11th day of June, 1932.

HARLAND B. HOWE,
United States District Judge.

Filed June 11, 1932,
A. Myrl Blakely,
Deputy Clerk.

## Judgment Order.

UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

| | |
|---|---|
| NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA. | At Law No. 816. |

On motion of the Assistant United States Attorney it is

ORDERED that the judgment order entered herein on June 11th, 1932, allowing J. A. McNamara, attorney for the plaintiff, as a reasonable attorney fee, the sum of ten percent of the amount of the judgment herein, amounting to $891.25, be amended by striking out the words in said order "and that he be paid the sum of $361.80 as and for his reasonable and necessary disbursements in and about the preparation and trial hereof, which are fully set forth in the schedule filed in the motion for said allowance;" so that said order will read as follows:

And now it is further adjudged that J. A. McNamara, of Burlington, County of Chittenden, State of Vermont, attorney of record for the plaintiff, be paid as a reasonable attorney fee the sum of ten percent of the amount of the judgment recovered herein, amounting to $891.25, and that he receive nothing from any future payments of the insurance on which this suit is based.

Done in Court at Burlington, this 22nd day of June, 1932.

HARLAND B. HOWE,
United States District Judge.

Filed June 22, 1932,
A. Myrl Blakely,
Deputy Clerk. 43

---

## Defendant's Bill of Exceptions.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } Law No. 816. 44

This cause came on for hearing at the Adjourned Special March Term, 1932, of the United States District Court for the District of Vermont, before Honorable Harland B. Howe, Judge of said Court, and a jury. H. C. Sylvester, Esquire, and J. A. McNamara, Esquire, appeared for the plaintiff. William J. Hession, Esquire, and Francis J. FitzGerald, Esquire, appeared for the defendant. 45

The trial was begun at Burlington, Vermont, on the eighteenth day of April, 1932, continuing up to and including April 20, 1932, when it was concluded.

The petition with amendments thereto, verdict for the plaintiff, the charge of the Court, and the judgment are referred to and made a part hereof.

46 The jury having been duly impanelled and sworn, the case was opened to the Court and jury on behalf of the plaintiff, and thereupon the following proceedings were had, oral and documentary evidence was introduced as follows, and objections were made and exceptions allowed to the defendant as shown in the following complete transcript of the proceedings:

NEWTON W. LUMBRA, the plaintiff, being duly sworn, testified as follows:

47

Direct Examination by Mr. McNamara:

Q. Your name is Newton W. Lumbra and you are the plaintiff in this case? A. Yes, sir.

Q. And you are now a resident of St. Albans? A. Yes, sir.

Q. Where did you live prior to the War? A. Montgomery.

Q. Born and brought up there, were you? A. Yes.

48 Q. And what time did you enter the War service? A. July, 1917.

Q. And where did you enlist? A. Fort Ethan Allen.

Q. In the St. Albans National Guard, was it? A. Yes.

Q. How far did you go in school? A. Eighth grade.

Q. And how old were you when you entered the army? A. Twenty-five.

Q. So you had been out of school a number of years? A. Yes, sir.

Q. Had you had some employment all that time? A. Yes, sir. 49

Q. What had been your employment for the last two or three or four years prior to going in the army? A. In the woods and shop and different places.

Q. For whom did you work? A. For Nelson Hall Co.

Q. And were you in the woods for some period? A. Yes.

Q. For how long at any one period? A. Why, a year. 50

Q. You were in there on one job for a year, were you? A. Yes.

Q. What year was that? A. I think it was 1915.

Q. Was your brother in on that same job? A. Yes.

Q. And after you got through in the woods, where did you go and work? A. I worked in the mill for a while after that.

Q. That is the Hall mill? A. Yes. 51

Q. That is located at Montgomery? A. Yes.

Q. How long were you there after this job in the woods? A. Probably six or eight months.

Q. Do you know how long you got through there before you went into the army? A. It wasn't very long.

Q. A matter of a few months, was it? A. A few months.

Q. What did you do the last few months before you went in the army? A. Worked on the farm.

52 Q. Where was that farm? A. Richford.

Q. Now, during those two or three years you have just told us about, what had your work been, steady or unsteady? A. Steady.

Q. Did you lose any time? A. No.

Q. Have any illness? A. No, sir.

Q. Any trouble with your health in any way, shape or manner? A. No, sir.

Q. Did you have any trouble passing the physical examination in the army? A. No, sir.

Q. What did you weigh at that time? A.
53 About 140.

Q. Had you ever had any army service before this? A. No, sir.

Q. You went in just what time? A. July 14, 1917.

Q. How long did you stay at Fort Ethan Allen? A. I don't know exactly how long. We were there—we weren't there very long.

Q. From there where did you go? A. Camp Bartlett, Westfield.

54 Q. Stayed there a while? A. Until October, I think.

Q. From there where did you go? A. Went overseas.

Q. Your outfit was part of what division? A. The 26th Division.

Q. That is the Yankee Division? A. Yes.

Q. The First Vermont Regiment all became part of that, did it? A. Yes.

Q. Did you go in training some place overseas? A. Yes.

Q. Stayed in training how long? A. Until February. 55

Q. In February what happened? A. Went to the trenches.

Q. That was the first action your outfit saw, was it? A. Yes.

Q. From February up until June, tell us briefly what your career had been over there, —just what the activity was? A. Well, we was in the Chemin des Dames front, the first front we went into. When we come out of there, we went on the Toul front,—went into line two or three different times, and then we went up to Xercay, June 16th I think it was,—that is where I got injured. 56

Q. So you had been on the Chemin des Dames front and on the Toul sector and these other places before you arrived at this Xercay front where you were injured? A. Yes.

Q. Between these various fronts were you back some place in training? A. Yes.

Q. Had you seen active fighting on these various fronts? A. Yes. 57

Q. What had been your duties with your company? A. I was number 3 man in the gun squad.

Q. What was your outfit,—what type of company? A. Machine gun battalion; Company.

Q. You say you were number three man on the gun? A. Yes.

Q. Had you been in that position on these various fronts? A. Yes.

Q. And, of course, had been under fire and fighting on those various fronts? A. Yes.

58 Q. Do you remember the day you were hit or injured? A. I think it was June 17th.

Q. What time of the day? A. About half past eight in the morning, I should think.

Q. How did it come about? Just what were you doing at that time? A. The enemy threw over a bombardment about three o'clock in the morning, we had just come out of guard duty and entered the dugout and they started to throw over a bombardment and we had to go out into the trenches; we stayed out there until about
59 eight thirty I should judge, when I was on the way back to the dugout; that is when this shell threw me and injured me.

Q. Tell us about that shell and describe what happened there. A. I was on the way to my dug out, it wasn't probably over fifty or sixty feet from the dugout when this shell came over and landed and that is the last thing I knew. I was in the dugout, they picked me up.

Q. You knew nothing until they picked you up? A. I didn't know nothing until I came to
60 in the dugout.

Q. Do you know what kind of a shell it was? A. Well, I don't know, it must have been 155.

Q. That is a high explosive? A. Yes.

Q. Did you see the crater of that shell afterwards? A. Yes.

Q. How big a crater did it make? A. Well—probably twenty feet across.

Q. And how deep? A. Ten or twelve feet probably.

Q. And it was the explosion of the shell that

made that crater that threw you to the ground, was it? A. Yes. 61

Q. And you came to in the dugout? A. Yes.

Q. Do you know how long you had been unconscious? A. No, I don't.

Q. What was your condition when you came to? A. I was very shaken and weak and beads of sweat stood right out on me.

Q. Any broken bones? A. Ankle.

Q. How long were you kept there in the dugout? A. We stayed there until that night when I was taken to the hospital. 62

Q. Have some medical treatment there? A. First aid.

Q. And how were you taken back that night? A. In the ambulance.

Q. Do you know where you went? A. I went to the 102nd Field Hospital over there; then when the Division was relieved I went to the Base Hospital.

Q. How long were you kept in hospitals? A. I came out sometime I think the latter part of August; right after the Company came out of the Chateau Thierry drive. 63

Q. Did you go back to the Company? A. Yes.

Q. During the time you were in the hospital did you notice anything different about your condition than there had been before? A. Yes, I did.

Q. Tell us just what you noticed? A. I used to have faint, weak spells, dizzy spells,—everything go black, and the sweat stand out on me and I would have to sit down.

64 Q. How often did you have those? A. Probably sometimes once a week and sometimes oftener.

Q. Did you have any medical treatment for them? A. No, I did not.

Q. Did you call the Doctor's attention to that? A. No, I didn't.

Q. Any reason why you didn't? A. I didn't want to stay in the hospital. I wanted to go back to the Company.

Q. As soon as your ankle was all right, you
65 went back? A. Yes.

Q. You stayed with the outfit the rest of the time? A. Yes.

Q. Did you ever go back to your original duties? A. No.

Q. What did they do? A. The Captain was asking one day—wanted to know how I felt, and I told him, and he said "stay in the kitchen and work."

Q. Did you do that the rest of the time? A. Yes.

66 Q. Did the kitchen get up near the lines at any time? A. No.

Q. How far back would the kitchen stay from the actual fighting? A. I don't know exactly but quite a distance.

A. Was it far enough back so you were generally away from the bombardment? A. Yes.

Q. What about these spells,—did you have any of these after you got back to the Company? A. Yes.

Q. How often? A. About the same as they were. 67

Q. Tell us how they affected you there, whether they were worse or less? A. They kept getting gradually worse as they went on—as time went on.

Q. Did the men there working in the kitchen know anything about this? A. I never said anything to them about this.

Q. Did your Company officers ever put you on guard duty again? A. No.

Q. You were in touch with them right along and they saw you there, did they? A. Yes. 68

Q. When the outfit moved, how were you moved? Did you go along the same as they did? A. Yes; I didn't carry any pack.

Q. Did you have rifles to carry? A. No.

Q. You simply had your pack to carry? A. Yes.

Q. How was it carried? A. Put on the gun car.

Q. Did you hike or did you ride? A. Sometimes I hiked and sometimes I rode. 69

Q. Were you supposed to ride? A. Well, I did any way.

Q. Do you remember how long you stayed in France after this? A. In France?

Q. Yes? A. Stayed there until April 6th.

Q. And then the Company came back to the States? A. Yes.

Q. And you were discharged when? A. April 29, 1919.

Q. That was at Camp Devens? A. Yes.

70 Q. And you went from there to your home, did you? A. Yes.

Q. Now, during this time, what about your insurance policy? Had you taken one out? A. Yes.

Q. And had you paid for it? A. Yes.

Q. How much were you paying for this? A. I think it was six-sixty a month.

Q. How much was your pay? A. Well, it was thirty dollars on this side and thirty-three across.

71 Q. And that six-sixty was taken out of your pay, was it? A. Yes.

Q. When was the last month you paid for that? A. I guess it was paid in advance. I think it didn't lapse until May 29th.

Q. You paid up until the time you got out of the army, did you? A. Yes.

Q. And was that paid during all the time? Did you pay if while in the hospital? A. Yes, it was taken out of my pay.

72 Q. What was your condition at the time you got out of the army in comparison with your condition when you went in the army, as near as you can tell it in your own words? A. It wasn't so good as it was when I went in, that's sure.

Q. Why wasn't it? A. On account of these spells I was having.

Q. You were having them at the time you got out? A. Yes.

Q. Describe the spells as you were having them at the time you got out of the army? A. I would get dizzy and weak and everything go

black around me, and I would just have to sit down or I would fall down. 73

Q. How did your head feel? A. I had terrible pain in my head. It started right in the back and worked up over the top of my head.

Q. How long would that pain continue? A. Oh, sometimes it would continue for a whole day.

Q. After everything became black and you had to stop, as you say, and rest, would there then be some relief? A. Yes, there would after a while.

Q. For how long would you be withouf this feeling? A. I might go along for a few days and it would come on to me again. 74

Q. Now, had the frequency of these increased or decreased from the time they started? A. Increased.

Q. How often were you having them at the time you got out of the army? A. How often was I having them when I got out of the army?

Q. Yes?. A. Probably once or twice a week.

Q. When you got home to Montgomery, what did you do when you first got there? A. Nothing; just stayed to home and rested. 75

Q. For how long did you rest? A. Three or four months.

Q. What was your condition during that time? A. Just the same as it had been. It kept getting worse a little all the time.

Q. Did the rest help you any? A. It didn't appear to, no.

Q. Where were you staying? A. At my mother's.

76 Q. Where does she live? A. At Montgomery.

Q. Does she live in the village or outside? A. In the village.

Q. After three or four months, what did you do then? A. I went to work; tried to work.

Q. Where did you take employment? A. At the Nelson Hall Co.

Q. That is the same place you had been before you went in the army? A. Yes.

Q. How long did you stay with them? A. Well, I was there the rest of 1919 and '20.

77 Q. Did you stay there into the year 1921? A. I didn't work much in the year 1921.

Q. Now, during 1919 and 1920 while you were there, what was your employment? A. Well, I worked in the mill there.

Q. Now, before you went into the army, what type of work had you done there at Nelson Hall's? A. I was rolling logs into the vats; heavy logs.

Q. How many hours a day did you put in at that? A. I was working nine or ten hours.

78 Q. And that is what you did all day? A. Yes.

Q. When you come back and took employment, what type of work did you do then? A. I tried to do that but I couldn't.

Q. How long did they keep you on that? A. Not very long.

Q. Did they change you? A. Yes.

Q. What did they put you on then? A. Inside; lighter work.

Q. Were you able to do that? A. Well, some of the time; I couldn't work steady.

Q. How much time did you lose there? A. I didn't work half of the time. 79

Q. Did you work as much of the time as you were able to? A. Yes.

Q. How about these spells, during this period 1919 and '20, along there, were you having them then? A. Yes.

Q. Whether they were more severe or less severe? A. They seemed to get worse all the time.

Q. After you had one, what was the effect of it upon you? A. Well, I would always be lame and sore, and weak. 80

Q. Were you able to work after you had one? A. No.

Q. How long would you have to rest? A. Sometimes three or four days or more.

Q. And did you work during that period whenever you were able to? A. Yes.

Q. You were living at home with your mother? A. Yes.

Q. Do you know how much you averaged to make a week during that time? A. Well, I never kept track of it. 81

Q. What is your best judgment on it? A. Oh, probably ten or eleven dollars a week.

Q. Was it enough to pay your board? A. Just about.

Q. Sometimes were there weeks you wouldn't get any pay? A. Yes.

Q. Did you pay your mother board that week? A. No.

Q. What was your arrangement with your

89 mother on your board and such things as that?
A. Well, when I had the money to pay it, I paid her, and when I didn't have it, I couldn't pay her.

Q. Did you pay her as much as you earned?
A. Yes.

Q. Finally you got through there and gave up altogether, did you? A. Yes.

Q. Were you forced to give up? A. Yes.

Q. They asked you to get through, did they?
A. Yes.

83 Q. And do you know why that was? A. Yes.

Q. Why? A. On account of my condition.

Q. And was that because of your nasal condition or something of that sort? A. Yes.

Q. Now, after you got through, what did you do then? A. I went up to my sisters' and stayed three or four months.

Q. During 1919 and 1920 were you calling on Dr. Hunt there? A. Yes.

Q. Do you know how frequently you saw him?
A. Well, I saw him a number of times; I don't
84 know just how often.

Q. I think you testified when you were on the stand before, you didn't know for what he did treat you. Do you now know for what he treated you? A. Nervous trouble; bronchitis.

Q. And that was right along during the years 1919 and '20? A. Yes.

Q. Did you describe to the doctor what was happening to you? A. Yes.

Q. And as a result of that, he treated you for some nerve trouble? A. Yes.

*N. H. Lumbra, for Plff., Direct.*

Q. Do you know when you last saw Dr. Hunt? 85
A. I think it was in 1921.

Q. And when you got through with Nelson Hall you say you went up to your sisters' on the farm? A. Yes.

Q. Where was her place? A. At Montgomery.

Q. How long did you stay there? A. Three or four months.

Q. Did you work there? A. Well, I helped around some.

Q. Did you get any pay for it? A. No. 86

Q. Did the rest there change your condition any? A. It didn't seem to.

Q. What did you do after those three or four months? A. Came to St. Albans.

Q. Did you get employment there? A. Yes.

Q. What doing? A. With the Railroad Co., Central Vermont.

Q. What was your work with the railroad when you first went in there? A. I was a helper, a machinist's helper.

Q. Through whom did you get your position 87
there with the Central Vermont? A. Well, it was one of the foremen hired me there.

Q. Who was it? A. I think it was Mr. Ackerman was the one that hired me.

Q. Did you see Mr. Noell in connection with getting it? A. Not when I first went there to work, he didn't hire me.

Q. What was your work there first? A. Machinist's helper.

88 Q. In what department? A. The locomotive department.

Q. Do you remember the date you started in? A. Sometime in July, I think.

Q. How long did you stay on there with the Central Vermont that time? A. Well, I stayed about a year, I guess.

Q. And how long did they keep you on as machinist's helper? A. Not quite a year.

Q. How was your employment during that period, steady or otherwise? A. No, it wasn't
89 steady.

Q. Do you know how much time you lost? A. Well, I lost considerable time.

Q. After your machinist's helper's work, what did they put you on next? A. As laborer.

Q. In the same department? A. I went to work across the road in the car department after that.

Q. You were out of work there from June to November that second year, were you? A. Yes.

Q. Did you do anything during that time? A.
90 Yes.

Q. What did you do? A. I worked for the Boston and Maine.

Q. Where? A. At Mechanicsville, New York.

Q. How steadily did you work down there? A. I didn't work any more there than I did to the Central Vermont,—I couldn't.

Q. Did you have a full week any of the time down there? A. I hardly think so.

Q. You stayed there until November? A. Yes.

Q. What happened to you then? A. I had to quit.

Q. Did they tell you to? A. Yes. 91

Q. Do you know why? A. Yes.

Q. Why? A. On account of my physical condition.

Q. Was there something about your work that brought on A. I lost so much time that they said they couldn't keep me.

Q. Did you get work again for the Central Vermont when you came back? A. Yes, I did.

Q. Where did they put you this time? A. I worked in the car department.

Q. What was that lighter or heavier work 92
than you had before? A. That was lighter.

Q. What was your type of work in that department? A. Laborer.

Q. How long did you stay at that? A. Well, I was there from '24 to '26 I think, in that department.

Q. Did you stay as a laborer all the time, or did they change you? A. They changed me once to a helper, but never long; they set me back again.

Q. Did you do some janitor work in the de- 93
partment? A. Yes.

Q. When did they put you on that? A. That was in 1926.

Q. What did you have to do as janitor work? A. Well, sweep up around the office and take care of the lavatories.

Q. Were you able to work doing that work? A. Well, some of the time. Not all the time.

Q. Did you lose time? A. Yes.

Q. Do you know how much you lost? A. I

94 don't know exactly how much but I lost quite a lot of time.

Q. Did they finally transfer you again? A. Yes.

Q. Where did they transfer you to? A. To the Motive power department.

Q. What were you put doing there? A. Night watchman.

Q. How long did you stay on that? A. I wasn't on that only a couple of months, I guess.

Q. Did the Company transfer you again? A.
95 Yes.

Q. Why? A. I wasn't working steady enough to keep me on that job.

Q. From the night watchman work, what did they put you on next? A. Put me on sweeping up around the shops; doing light work; odd jobs.

Q. Was that the work you stayed on until you got through? A. Yes.

Q. So you kept being transferred from one department to another and from one type of
96 work to another in these various departments? A. Yes.

Q. During all that time you have testified? A. Yes.

Q. At any time did you go from light work to heavy work? A. No.

Q. Was it always from something fairly heavy to something lighter? A. Yes.

Q. And whether or not these changes improved your condition any? Were you able to work any better or any steadier? A. No.

*N. W. Lumbia, for Plff., Direct.*

Q. And finally something happened, did there? '97
A. Yes.

Q. What was it? A. I had one of those spells in the shops and went unconscious.

Q. What year was that? A. 1929.

Q. You have told the jury about these spells up until the time you went to work for the Central Vermont Railroad. Now, describe your physical condition and how this was working on you from the time you started in at the railroad down to this period. A. It kept getting worse until I started getting unconscious in them until the '98
latter part of '22 or first of '23.

Q. That is the first time you went unconscious? A. Yes.

Q. Do you know how long you stayed that way? A. What? Unconscious?

Q. Yes. A. No, I don't.

Q. Do you know where you had this first spell? A. Home.

Q. And did you injure yourself any at that time when you went into it? A. Well, I fell on the floor; it hurned me up some; bruised me. '99

Q. Lose any time at that time? A. Yes.

Q. How many days? A. Three or four days, I guess.

Q. From this time on, how about these spells? Tell us. A. They kept getting worse as time went on; they kept growing worse; more severe.

Q. How about their frequency? A. I had them more often too, harder.

Q. Had you any warning they were coming at this time? A. Sometimes I would and sometimes I wouldn't.

100 Q. Tell me what the warning was? A. I used to get those terrible pains in my head; might have them for a day or two, and this time that they found me, unconscious, I didn't have any warning.

Q. You didn't have any more of that pain? A. I didn't have any warning at all.

Q. Did you have any of these spells while you were at work for the Railroad on your work up until that time? A. Not that I know of, only that time I lost my job.

101 Q. What did you do if you had the warning of them? A. I used to go home.

Q. What did that mean with regard to your work? Did you go back to work right off? A. No, I would go back when I felt better.

Q. Tell us how much time you would lose? Tell us about your employment and how that affected it. A. I might have one of those spells and probably have three or four in succession; that is, a series of them, and probably wouldn't go back to work for three or four days or a week,

102 and sometimes longer.

Q. Sometimes shorter? A. Sometimes, yes.

Q. Was there any period that you were not subject to these spells from the time you started becoming unconscious? A. No.

Q. Now, did the other men in the shops take time off the same as you did? A. No.

Q. And what was the attitude of the Company toward you and your employment there? A. They were very good to me.

Q. How about the other men,—what was the

men's attitude there? A. They were very good 103
to me too.

Q. And did they help you with your work? A. Yes.

Q. Tell us about that. A. Well, if I had anything that was a little hard for me to do, they would help me to do it.

Q. How often did that happen? A. Well, practically every day.

Q. How about your hours? Did you always report at the same time for work? A. Not al- 104
ways.

Q. Any complaint if you come in late? A. No.

Q. And how about your hour of getting through? Was that the same? A. Just the same.

Q. Was it always the same hour that you finished work? A. Well, unless I had to go home during the day.

Q. When you went home during the day, was there any complaint by the Company over that? 105
A. No.

Q. Did you ever have any trouble with the Company in any way, shape or manner over your working or the unsteadiness or anything of that sort? A. No.

Q. During this period were you able to earn anything to support yourself? A. Not all the time, no.

Q. Did you have to get help? A. Yes.

Q. Where did you get that help? A. From the American Legion.

106 Q. What type of help did they furnish? A. They furnished groceries and wood,—paid my rent.

Q. Did you have medical attention for these spells of yours? A. Before I had these spells?

Q. No, during the time you were having them? A. I never had any doctor until 1926.

Q. How did it happen you started getting doctored then? A. The Veterans Bureau sent me to Dr. Herman.

Q. From then on has he seen you right along?
107 A. Yes.

Q. What does he call these spells of yours? Epilepsy.

Q. Does he do anything that relieves them? A. There is nothing which you can do, I guess. He gave me luminal.

Q. What does he say about that,—does he say he can relieve them?

Mr. FitzGerald: I object to what the doctor says.

108 Mr. McNamara: The doctor's statement about what is ailing him and what he can do is certainly material.

The Court: That is hearsay evidence.

Mr. McNamara: That doesn't come under the hearsay rule. A man may tell about his physical condition,—what he learned from the doctor, without being hearsay. He may base his own knowledge of his own condition upon what he learns from medical advices. We will have the doctor as a witness, so we won't stress that.

Q. The doctor has given you some drug, has 109
he? A. Yes.

Q. Do you know what it is? A. Yes.

Q. What is it? A. Luminal.

Q. Have you taken that right along? A. Yes.

Q. Has that affected your condition any? A. I don't think it done it much good.

Q. Do you see any improvement? A. Perhaps I haven't had as many spells as I would if I hadn't taken it, but have had plenty as it was.

Q. How often have you had them since you started treating with Dr. Herman? A. I have 110
had as high as six or seven inside of twenty-four hours.

Q. How do you feel after you have spells or a series of them that way? A. I feel all broken up,—lame and sore.

Q. How long would you stay that way? A. Probably three or four days or a week.

Q. In March, 1929, was the time you had the spell at the shop? A. Yes.

Q. Did you have any warning of that one? A. 111
No, I didn't.

Q. Do you know where you were when you fell? A. No, I don't.

Q. How were you that morning? Had something happened at home before you came to work? A. Yes.

Q. What happened? A. I had six spells.

Q. What time did they start? A. Around six o'clock.

Q. And how long did they continue? A. About seven.

112 Q. What time did you go to work? A. I went in at eight o'clock.

Q. What time did you have the spell on the job? A. About nine, I think.

Q. Where were you when you came to? A. In the First Aid room.

Q. Who was there? A. Dr. Davidson.

Q. What was done for you? A. Well, I guess they couldn't do much just wait until I came to, and I was taken home.

Q. You were taken home then? A. Yes.

113 Q. Did your employment with the railroad end at that time? A. Yes.

Q. And what employment have you had since that time? A. Not any.

Q. Do you remember what date that was? A. That I got done for the railroad?

Q. Yes. A. It was March 28 the day I had this spell but they didn't let me go until March 4.

Q. You mean February 28? A. Yes, February 28.

114 Q. And on March 4 they let you go? A. Yes.

Q. Since that time have you tried to get other employment? A. Yes.

Q. Where? A. The City.

Q. Would they give you employment? A. No.

Q. What time of the year was it you applied for this work? A. In the summer.

Q. Were they hiring men? A. Yes.

Q. What work were they doing? A. All kinds of work.

Q. Who did you see? A. Mr. Summer, the City Manager. 115

Q. Did he give you any work? A. No.

Q. Have you tried to get other employment since then? A. Yes.

Q. Were you able to get it? A. No.

Q. Do you know why? A. Yes.

Q. Why? A. On account of having these spells.

Q. And that has been the case right along since you got through with the railroad? A. Yes.

Q. You are married? A. Yes. 116

Q. And have a family? A. Yes.

Q. I want to have you tell the jury in your own way just about how you noticed this first spell you ever had and just what the development has been in that condition right down through up to the present day. A. When they first came on me in France you mean?

Q. Yes. A. Well, I used to get these dizzy spells and pains in my head, and dizzy, and everything got black in front of me and big beads of sweat stand out on me and I would have to sit down, and they continuously got worse as time went on; gradually got worse, right up through until I began to get unconscious, and they kept getting more severe. I had them more often until I lost my job and they have continued ever since. 117

Q. Now, how do you feel as you now see this, in comparison with the way you felt—your mental and physical attitude towards things—before you went into the army? A. Well, I don't feel

118 the same. When I went in the army I was a good sound man, nothing the matter with me.

Q. How did you feel when you came out of the army? Did you feel the same? A. No, I had a depressed feeling and these spells would come on me and kept getting worse all the time.

Q. Have you ever at any time felt the same as you felt before you went in the army? A. No, never.

Q. When did you first learn that these were epileptic fits? A. Dr. Herman was the first one

119 told me.

Q. You had been having them for how long before you saw Dr. Herman? A. Three years.

Q. These spells you are now referring to are the ones in which you became unconscious? A. Yes.

Q. The other spells you had, you had back for how long? A. From the time I was in France or the hospital.

Q. Whether or not the warning that you have of these epileptic seizures is the same or similar

128 to the spells you had before you became unconscious? A. Yes.

Q. Start the same way, do they? A. Yes.

Q. Work right along the same way? A. Yes.

Q. But now there is the difference that you after a certain time become unconscious? A. Yes.

Mr. McNamara: If the Court please, I haven't asked the witness how he feels about going on cross examination.

Q. Do you want to go on cross examination

this afternoon or would you rather rest? A. I feel I would like to rest now. 121

(Recess.)

Q. Since you started being treated by Dr. Hermann in '29, have you been sent to the hospital by the Government? A. Yes.

Q. How many times? A. Seven.

Q. And how long have you been kept there? A. Anywhere from two weeks to two months. 122

Q. What hospitals have you been sent to? A. Chelsea Naval Hospital and Washington, Mount Alto.

Q. Did the Government send someone along with you as an attendant? A. Yes.

Q. And send someone after you to bring you back? A. Yes.

Q. When were you last in the hospital? A. In 1930.

Q. Whether or not getting tired has any effect on your condition? A. Yes, it seems to. 123

Q. How? A. Well, when I get tired it seems to bring on these attacks.

Q. Has that been the case right along? A. Yes.

Q. When you were working for the railroad, what did you do about rest? Did you take more rest than a normal man then would? A. Yes.

Q. How did you do it? A. When I got done work I would lie down until supper time.

Q. What time did you get through work? A. Four o'clock I got through work and I would lie down until supper time, then eat and stay there so I could work the next day.

124 Q. What was that, a regular thing? A. Yes.

Q. How have you been since you had this trial about a month ago, have you had any of these spells? A. About fifteen.

Q. When did you have the last one? A. Day before yesterday.

Q. Have you had more than one of the same series? A. Yes, five or six.

Q. What day was that? A. That was a couple weeks ago.

Q. And over how long a period did these five
125 or six fits last? A. Over probably ten or twelve hours.

Q. Now, since you left the army in 1919 do you know of any work you have been able to do that you could work at steady enough to earn a livelihood? A. No.

Q. You have tried just as much as your condition would permit, have you? A. Yes.

Mr. McNamara: I think that is all.

(Cross examination put over until tomorrow.)

126

WALTER E. BELL, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. You live in St. Albans? A. In Swanton.

Q. You are in business? A. Yes.

Q. Where? A. I have two stores, one in Swanton and one in St. Albans.

Q. What type store? A. Radio dealer and 127
electrical appliances.

Q. Were you in the same Company with Newton Lambrn during the war? A. Yes, sir.

Q. You were a corporal as I understand? A. Yes, sir.

Q. In his platoon? A. Yes, sir.

Q. Came in pretty close contact with him, did you? A. Why as close as an officer would come.

Q. See him pretty frequently? A. Yes.

Q. How often? A. Well, at the beginning of the war you would see him night and morning at 128
least. You would put him out on post duty. You might not be in the same dugout but you were in contact with him during the twenty four hours.

Q. That is your relationship to him during the period down to the time he was injured, was it? A. Yes.

Q. What kind of a soldier was he? A. Well at the front I cannot exactly say, discipine is disregarded in some respects on the front; you are put out and left there. He was always at his 129
post until relieved. I would say a good type of soldier.

Q. Do you know of his having any physical disabilities or troubles during that period? A. No, sir.

Q. Do you remember the morning he was injured? A. Yes, sir.

Q. Did you see him that morning? A. Did I see him that morning?

Q. Yes? A. I did not see him that morning.

Q. Did you see him after he was injured, in the dugout? A. Yes, sir.

130 Q. What was his condition when you saw him there? A. Well well, after this battle this barrage that is, why, of course, we come back at different times. I was out longer than he was, and I come in about well, I came in in the afternoon sometime and they were in the dugout working on him. He was in the dugout.

Q. You knew in that way he had been injured? A. Yes.

Q. Do you know the time of the morning he was injured? A. He was injured in the same
131 attack we all had to go back in, he went out of the dugout possibly the same time we did. He was out on duty all night the same as I was on, and on coming back to the dugout, which was supposed to be the evening's work completed, this barrage came unexpected and the attack made, and no exchanges whatsoever, and no meals and we have to return, and in the return we start back for our positions, and just as we left the entrance to the dugout for our positions, those big shells, or in other words, the barrage
132 was arriving at your, and of course you start for your position and those that got there in my travelling I travelled direct to the left on leaving the dugout, he might have travelled a different direction, but in my travels the barrage was so extensive in several instances I was pushed down, and naturally I wouldn't be watching where somebody else was going.

Q. You went through the same barrage or bombardment and was not injured? A. Yes, sir.

Q. Were there some others injured in that bombardment? A. Yes, sir. 133

Q. Did you see the crater made by the shell that threw him? A. I wouldn't say the crater; I saw several of the craters.

Q. In that immediate vicinity? A. Yes.

Q. What kind or size was made there? A. Depending on the shell, I should judge that morning the shells coming at the troops that morning was what they term a 157 millimeter, which would, in terms of size, would be about the size of the ordinary stove pipe. 134

Q. That is that big around? A. That size.

Q. And how long a shell? A. They run 12 to 14 inches, the iron part of the shell, and when they enter into the ground, some have primers on the end so they break immediately; others penetrate after they hit and then break. They left craters twenty to twenty-five feet deep with a ending across of twenty to twenty-five feet in diameter.

Q. Did you see several such holes or craters that morning? A. Yes. 135

Q. Was it a pretty general shelling you got there that morning? A. Yes, it was.

Q. Did you see the effect of this bombardment on some of the men, just what happened to them? A. Yes.

Q. Describe that to the jury.—

Mr. FitzGerald: I object to him describing anything that does not relate to Mr. Lumbra, as being immaterial and irrelevant.

136 The Court: Why not, to show its severity or mildness?

Mr. FitzGerald: It might have killed twenty-five men and not affect Mr. Lumbra.

The Court: As showing the severity,—whether much or little,—powerful or mild.

Mr. McNamara: It is our contention this shell did not strike him, nor any fragment but shells exploding that way had a peculiar action in causing a curious con-
137 cussion. Some men were decapitated entirely,—blown to pieces, although nothing hit them. This man was there and saw this happen.

Mr. FitzGerald: Exception?

The Court: Yes.

Mr. McNamara: This, of course, will be in connection with the plaintiff's testimony he was thrown forty feet, as to whether or not that is probably so;—corroborating that fact.

138 Q. Go on and describe to the jury the bombardment and the concussion effect of these shells. A. Well, on leaving the dugout entrance—directly after we come in we got notice we have got to go back,—the minute we left the dugout this particular morning, as we start for our positions that were our positions in the trenches a few hours previous, we find on leaving the dugout we are all in the midst of the bombardment and we have got to take our best course to get to what I call our positions. We have got to get

in there and set up another gun to prohibit the enemy from coming, and on the way over to the position I was travelling with another soldier from this same territory and several others from a different territory, and in trying to get at the position that is the most serious, on the way over we deliberately got throwed or pushed down several times with this terrible force of the shells breaking. If the shells break close to you they will take your life without possibly any notice whatsoever to you. Shells that whistle by you, you have no fear of; you can hear them and know about where they will land from you. Other shells that strike within twenty-five or thirty feet from you will push you and throw you from the force of the shell but might never injure you,—which we have all had that occasion,—us fellows that have been there, to be throwed.

Q. How far did they throw you? A. Several feet; twenty-five or thirty feet, and still not hurt you. If they're still further away they might tear you up from the fragments of the shell. They break in an arch form, and if you are in the half way distance of the arch, you will feel just the concussion, which in my own instance I have been several times forced deliberately on my face, and with my eyes closed as hard as I could close them, still see the flash and still be uninjured. If you were further away you would be torn from the fragments of the shell. These boys that went with me this particular morning,—we have one,—I don't see him here but he could be brought here,—and he was covered up completely,—just his

142 head remained above the trench, from one of the shells breaking. His head was above the trench. There was no harm done to him but the concussion, caved the trench in on him. We remained in this position and had to stay there in my particular position until after things quieted down. This happened in the morning about nine o'clock. We had to remain there because—a few had caved into the dugout,—but the enemy's plane was above us and it was taking photographs of the damage it had done. We couldn't make any
143 change in our position,—we had to remain there, —so when I did leave this position to enter the dugout was the time I saw the casualties, which we became hard-hearted to,—and I saw Mr. Lumbra for the first time, being worked on.

Q. You knew he went back to the hospital? A. I knew he was evacuated that night.

Q. Do you know he was away for sometime after that night? A. Yes I knew because I later took charge of that platoon and he was put back in my platoon.

141 Q. Did you have some men in your outfit who underwent this type of concussion that developed into mental cases while with you there in the service?

Mr. FitzGerald: I object—too highly immaterial and irrelevant.

The Court: That shows whether others were similarly affected.

Mr. FitzGerald: I lost an ear over there and others were not injured at all. That would not indicate they suffered injury.

The Court: I think I will let that go in. 145

Mr. FitzGerald: Exception.

Q. Tell us about that. A. Yes, it has happened to several within our Company that we have had experience with. The first Vermonter killed in the World War was killed by concussion and he was not hit by any fragments of shells.

Q. Did some of them develop insanity or marked mental trouble? A. In this particular case he was killed instantly, and others in the Company I believe are drawing compensation for 146 injury; they were shell-shocked at the time and had to be relieved.

Q. You remember that? A. Yes, sir.

Q. Did some of them after being affected, ever rejoin the Company again?

The Court: I wouldn't go into that.

Waived.

Q. After he was evacuated to the hospital did you later know he was back with the outfit? A. Yes, sir.

Q. In what capacity? A. He was at the rear. 147 A machine gun company, you understand, has its guns at the front and we have a detachment of mules which we call—the artillery calls them caissons,—they are a light craft with a mule hitched to them, that draw the guns to and fro from the front and come as near to the front as they can with rations and stuff. That is a class of light duty,—the "mule skinner,"—he can ride. The kitchens—they stay back different distances according to the lay of the land; they might be

148 with five or ten miles from the front, it depends on the lay of the land, and we knew he was there because we had to send men back from the front line, and he knew who the cooks were at the rear. Naturally I had to know who the mule skinners were when I had to be moved.

Q. You knew he was back there doing that type of light duty? A. Yes, sir.

Q. Did that indicate anything to you whether or not he was under some disability, the fact he stayed back there and was not sent back to his
149 guns? A. It had some effect because every day when we had casualties we called for men and if they have any experienced men at the rear, they will not furnish us inexperienced men. If he was capable of coming back to the front, they would have sent him back.

Q. Do you know if he ever came back and was in the line doing that type of work again? A. I don't believe I can recollect of ever having him on the firing line again.

150 CROSS EXAMINATION by Mr. FitzGerald:

Q. What date was it, Mr. Bell, that Mr. Lumbra received this injury? A. According to my company history which I had on file, it was June 16 or 17.

Q. In the morning of that day, where were you? A. The morning of that day—it is hard for me to answer, because it was a continuation of the night before. You understand I am in these trenches during the darkness;—I have come back to the dugout at the break of day, and

on entering the dugout, immediately, without any 151
signs of any warning at all, we are ordered back. That is the day of the injury, when the biggest bombardment was handled. On leaving immediately to go back was when the major part of this battle was had.

Q. Were you on outpost duty that night? A. It was trench warfare.

Q. How deep a foot? A. Six feet.

Q. On what front? A. What we called the Neuve Maroenin(?).

Q. Six foot trenches? A. Six foot trenches. 152

Q. Where was your dugout located? A. Our dugout? If you could go directly over land, approximately two hundred feet to the rear.

Q. Of the trenches? A. Of the trenches.

Q. What kind of dugouts were these? A. These were large, deep dugouts, around seventy-five feet below the surface of the earth.

Q. When you returned on the afternoon, I believe you said, of June 16 or 17? A. Yes.

Q. You saw him in the dugout? A. Yes.

Q. What were they doing with him? A. He 153
was in sort of a condition—he was lying on his bunk and they were working on him. He had one foot out from the bunk,—the shoe was removed, and he had been bandaged and was awaiting removal order.

Q. Was he conscious or unconscious? A. He was conscious.

Q. They were not working on him? A. Yes, the boys who was staying there; there's other boys with other injuries about him, consoling

him, telling him he will be all right, and so on. I, myself, and the other able bodied men who have got to go back, don't get interested in the wounded because of the hardships we have still to continue, because we are not concerned.

Q. You are not the least bit concerned with a fellow soldier? A. We very seldom say anything to him whether wounded or unwounded. You take care of yourself.

Q. That is also the case when in a seventy five foot dugout? A. Yes.

Q. Yet you have a complete recollection of Mr. Lambra's condition, but you didn't talk with him? A. I didn't talk to him but there's other incidents in the dugout that makes the incident well known.

Q. You spoke of this barrage that came over. What's the first thing you do when you hear a shell come? A. What's the first thing you do when you hear a shell come?

Q. Yes. A. Well if you are out there in the position, when you hear a shell come, you cannot term it as such, as one shell, you hear the shells, hundreds of them, passing you, they go by with a nice little whistle, and if your can hear them whistle you know they aren't going to injure you; it is one that isn't going to whistle is the one that is going to label you.

Q. You testified you could tell whether they were coming within twenty or twenty five feet of you, where they were going to land? A. No, I didn't testify to that.

Q. Isn't it a fact after you have been in the

front a little while, you can tell within twenty five feet where they are going to land? A. No, sir. 157

Q. Isn't it a fact you "duck" the first thing? A. It is right, you do.

Q. If you don't know where it is going to land, why do you "duck"? A. I can't tell you where the shell's going to land.

Q. Why do you duck? A. Simply because you are not brave enough to stand up.

Q. Is it a case of cowardice? A. No, but what does any man do when you know that? 158

Q. It is a case of protection? A. I would say it is just a case of "afraid". I wouldn't say a coward, but would say "afraid".

Q. Have you ever ducked? A. Yes.

Q. You don't think it is cowardly? A. No.

Q. You know everyone ducked if they got a chance? A. Yes.

Q. It wasn't cowardice? A. No.

Q. They ducked because they were coming so close? A. I tell you I don't know if it's going to land twenty feet from them. 159

Q. You spoke of 157 millimeter. Is there any mistake that might be 155? A. 155 is the American, 157 is the German; quite certain I am.

Q. The 157 is comparable with what in inches? A. I would say it would be what we would call the six inch.

Q. A six inch shell, wasn't it? A. A six inch shell.

Q. What kind of soil was on that front that day? A. Sandy soil.

160 Q. Very sandy? A. Very sandy soil.

Q. You told about going out with this group to the left, and Mr. Lambra went to the right? A. I am not sure.

Q. You are sure he went out? A. Yes, I am sure he went out.

Q. This crater you referred to, do you know whether that is one that was caused by the shell Mr. Lambra received an injury from? A. I do not.

Q. You don't know anything about his injury
161 except you saw him in the dugout? A. That is all sir.

Q. You testified after this occurrence Mr. Lambra returned and was put in your platoon, didn't you? A. Yes, sir.

Q. Did you have occasion to go back to the echelon from time to time? A. No, sir.

Q. You only knew he was back there? A. I knew he was back there when we moved out, the only time I have occasion to go to the rear.

Q. What was he doing? Was he a "mule
162 skinner" as you term him? A. I don't know what their duties back there are; who takes care of the mules and who takes care of the kitchen. On my list he was supposed to be in the kitchen but I don't know what his duties were.

Q. By the way, how long was he absent? A. I couldn't tell you.

Q. Was it a couple days or a couple of weeks? A. Absent from the time he was injured until he came back?

Q. Yes. A. Changing men so much it isn't safe for me to say. It was months.

Q. A period of months? A. A period of 165
months.

Q. During his absence, who did the duty which he did upon his return to the outfit? A. Well we have casualty troops or we have troops that kept coming in and filling up. Every battle when we lost out, or eight or ten wounded, we have a replacement; we call for them and they bring up new men. On this particular front—it is possible,—trench warfare,—we didn't replace. As I recollect, we didn't replenish the front.

Q. You misunderstand me. Who did this light 164
duty he did after he returned, who was doing it during his absence? A. I don't know as I can name the party, but I think I can; a man by the name of Drew.

Q. He did that work while Lumbra was absent? A. I think so.

Q. You referred to getting replacements. What method did they have about getting replacements? A. I don't know what method they had back at the rear. All I had was to issue the same as I would rations,—call for so many re- 165
placements. My rank was corporal—acting sergeant for this particular sector, and later sergeant—acting lieutenant.

Q. Who asked for the replacements, the noncom or the officer in charge? A. We didn't have any officer in charge, if you please.

Q. Never had? A. Not at this period.

Q. How long a period were you without an officer? A. At this particular front, the Captain or the man in charge of the Company, is at the

166 rear. There is no what we would call other than non com officers at this section at the time of this battle.

Q. Who was the ranking non com at this time? A. I think a party by the name of Porterville(?).

Q. Would you make your request to him or each platoon move on and get them as best they could? A. At this particular front I notified him that he wouldn't send any further commands if he didn't leave the dugout and do likewise
167 with the rest of us.

Q. To whom were you referring? A. To the sergeant in charge.

Q. You were not in charge of the platoon at that time? A. I was not.

Q. You ordered the replacements or requested them? A. I requested them of him and forced the order through.

Q. What action was taken after that you don't know? A. I do not know.

Q. You don't know whether they had exper
168 ienced men back there or not? A. No.

RE-DIRECT EXAMINATION by Mr. McNamara:

Q. But you do know if they had experienced men who were able to come, they would have come? A. At that particular front all our Company was at the front,—all but the officers.

*Capt. R. H. Pollard, for Plff., Direct.*

CAPT. R. H. POLLARD, called as a witness 169
by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. At the present time you are Captain of the National Guard at St. Albans? A. Yes, sir.

Q. Were you with Mr. Lumbra in service? A. Yes, sir.

Q. What was your rank? A. Sergeant.

Q. Were you on the Xereny front? A. Yes. 170

Q. At the time of the bombardment he and Mr. Bell testified to? A. Yes.

Q. Do you remember that affair? A. Yes, sir.

Q. Whether or not it was rather a severe bombardment, was it? A. It was.

Q. What type of shell was it, or different types? A. Different types. I wouldn't dare to say, some large and some field artillery.

Q. Did you see the craters in this vicinity between the dugout and the trenches? A. I didn't 171
see that particular dugout. I see plenty of craters.

Q. How sizeable were they? A. Why, they varied in size, depending upon the formation of the land. If it happened to be soft earth, a large shell might penetrate perhaps twenty-five feet. If it was hard earth, they would just "plop" on top and you wouldn't have much of a crater.

Q. What was the general condition of the soil around there? A. Why, that varied too.

172 Q. How deep and wide was the largest crater made there or that immediate vicinity? A. I have seen craters you could put half of this room into.

Q. Right in this locality? A. In that vicinity, yes.

Q. Now you knew Taunbra from the time he joined the Company at Fort Ethan Allen, did you? A. I saw him when he was brought down there as a recruit.

Q. What was his physical appearance at that
173 time? A. He appeared like a nice, husky country boy just brought down; full of life and pep.

Q. You kept in contact with him during the rest of the time he was in the Company? A. I did up until going overseas.

Q. Was there any change in his condition during that period? A. Why only through training. It developed him in physique; he was quite apt; got along first rate.

Q. Did you see anything of him in his work
174 overseas? A. Occasionally.

Q. Did you see him the day that he was evacuated to the hospital? A. I don't think so.

Q. Did you know just what his line of duty was up to that time? A. I know he was just a man in the squad; probably a mechanic or an assistant gunner.

Q. Did his duties require he be with the gun? A. Yes, sir.

Q. Where were the machineguns placed? A. They're out in commanding positions to command approach from the enemy.

*Capt. H. H. Pollard, for Plff., Direct.*

Q. Very often in front of the front lines, were they? A. At different times, yes. 175

Q. Where were the machine guns placed? A. The whole crew have to stay there with it, was that their assignment? A. Yes, to service the gun.

Q. You had been through three or four engagements before the Xerney front? A. I had been with the organization throughout.

Q. I mean the organization had been through three or four active engagements before this? A. Yes. 176

Q. Did you see him from time to time during this period? A. Yes.

Q. Any change in this period, or did he stay about as he had been? A. No, I didn't see any change in him.

Q. You learned he had been evacuated to the hospital? A. Yes, sir, from seeing the records or something.

Q. Did you know why he had been evacuated? A. Yes, I saw it through the orderly room. I was quite familiar with the First Sergeant. 177

Q. You learned in that way from the records why he had gone back? A. Yes.

Q. Why was it? A. A wound; a casualty.

Q. Do you know how long he was away? A. He came back after Chateau Thierry, sometime in August.

Q. When did you come out from Chateau Thierry? A. Around the 29th day of July.

Q. It was some little while after that you knew he was back with the company. From then on

178 you were in the Meuse-Argonne, were you not? A. Yes.

Q. And in the St. Mihiel drive? A. Yes.

Q. And in any others? A. No, I went with the organization throughout its engagements.

Q. And the 26th Division stayed in active combat throughout the war? A. Up until November 11th.

Q. Did Lumbra come back to join his outfit at the duty he had had before he went to the hospital? A. No, he was put on what we call
179 light duty.

Q. Did you see him from time to time? A. Yes.

Q. Had his appearance changed? A. Well I would say that it had.

Q. In what respect? A. He seemed to be slow; he didn't seem to care; wanted to poke around; didn't care to be neat or anything else.

Q. Was that quite a marked change from what it had been before this time? A. Yes.

Q. Whether or not he stayed that same way
180 during the rest of the time you were in France? A. I couldn't see as he improved any over that.

Q. How was he about getting around after he came back from the hospital? A. I didn't see much outside of the kitchen. I just see him poke around,—peel potatoes, and things like that; not look very good.

Q. Did you ever see him do any heavy duty from then on? A. Nothing, only perhaps load his kitchen; assist in the kitchen; as a helper in the kitchen work.

Q. Have you known him since he got out of service? A. Yes. 181

Q. And how has his condition been since then, do you know? A. It wasn't too good in the last two years.

Q. You simply know him in the last couple of years? A. That is in a way through the American Legion.

Q. But you haven't had any intimate acquaintance with him so you would know just what he has been doing since he got out of service? A. No, sir. 182

Q. When he came back and was discharged at Camp Devens and returned home, tell us, as well as you can, how he appeared in comparison with the way he appeared when you saw him come down to Fort Ethan Allen to join up with the army? A. I won't attempt to say.

Q. Was there a change? A. If I look back at it that way I would say there was a change.

Q. Just how was it different? How much of a change? A. I couldn't say how much but when I saw him as he entered the service as a recruit, when he came down for recruit drill, he was a husky lad,—looked like a country boy, full of life,—ready to do anything, and the way I saw him on board ship, he didn't care much what happened. 183

Q. Listless? A. Just listless,—lifeless.

Q. Any different look to his face? Had his expression changed? A. Why I wouldn't dare to say; his eyes didn't have any life; I cannot say that the—, the boy didn't appear the same any how.

184 Q. There was some marked change but you don't know just what it was? A. Yes.

Q. Did you see some shell shocked men during your experience? A. Yes.

Q. Was he of that same type? A. That is what I attributed it to.

Q. That is the army designation of a man of his type? A. Yes.

Q. By the way you are at the present time in the employ of the United States Government as a Customs Inspector? A. I am.

185

CROSS EXAMINATION by Mr. FitzGerald:

Q. How heavy was Mr. Lumbra when you saw him in 1917? A. I would say he was a lad around perhaps 135 to 50 pounds; well built.

Q. Might he have been much lighter than that, Captain? A. I hardly think so. One little incident that was brought out, I saw him in two or three scraps; that is, with the boxing gloves around the Company Street, and I thought he was a pretty husky lad.

186 Q. Your recollection of him is a man about 135 to 150, is that it? A. Somewheres around there.

Q. When he went into service in '17, Captain, on this front where Mr. Lumbra received an injury, what was the—where were you that night? A. I was over farther to the right I think. I was on the right of the town.

Q. Where was Mr. Lumbra? A. He was on the left of me, in the second platoon.

Q. About how distant were you from that position? A. Possibly three hundred yards.

Q. These trenches, Captain, what were they like? A. The trenches in our particular sector were down front; we were on commanding ground, supporting—that is, we were shooting over head fire over our sector of the trench. 187

Q. Did they have trenches down there? A. Yes.

Q. In the last trial didn't you testify there were no trenches? There was fox holes? A. No; at Chateau Thierry you asked me where the trenches were.

Q. I think you are right. I beg your pardon. On the evening of Mr. Lumbra's injury, what kind of a bombardment was that? Just a general barrage, is that what it was? A. No, it was the first real serious barrage that this organization had on that front. 188

Q. Was there air craft in use? A. Yes, sir, the planes were around that day.

Q. Which makes the larger crater, a six inch shell or a bomb from a plane? A. It depends on the size of the bomb used.

Q. Isn't it generally true that the bombs from the aeroplane make a larger crater than a six inch shell? A. A fifty pound bomb from an aeroplane would make about exactly the same size. 189

Q. If it was a 150 or 200 pound bomb, it would be larger? A. Yes, I believe it would.

Q. This crater you saw in France you could probably put half this room in, what size bomb or shell do you think caused that? A. It depends on what the ground was.

*W. E. Bell, re-called, for Plff., Re-cross.*

190 Q. You saw it; you know. A. I saw several of them.

Q. What size? A. I don't know what size the shells are; no man knows exactly the size of the shell unless he picks up the fragment.

Q. On this front Mr. Bell testified was very sandy soil. What size crater would a six inch shell probably make there? A. I wouldn't attempt to say.

Q. Isn't it true, the more sandy the soil, the more shallow the crater, whereas in solid
191 ground, not too hard, of course, the crater will remain larger? A. There is no resistance; the shell will penetrate to a greater depth.

Q. And the upheaval will be greater, won't it? A. It would.

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WALTER E. BELL, re-called.

Re-cross Examination by Mr. FitzGerald:

192 Q. Did Mr. Lumbra make any complaint to you after he returned, about being in poor health? A. After his—

Q. After he was evacuated and returned to the outfit? A. No, sir.

Q. Have you been associated with him since the war? A. No, sir.

CORDES M. FOLEY, called as a witness by 193
the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. What is your full name? A. Cordes M. Foley.

Q. Where do you reside? A. Swanton, Vermont.

Q. How long have you lived there? A. Six years. 194

Q. Previous to moving to Swanton, where did you live? A. Montgomery Center.

Q. What is your present occupation? A. Engineer in the Highway Department, State of Vermont.

Q. How long have you been so employed? A. Since 1922 steadily.

Q. Have you been employed by the State of Vermont since 1922? A. Yes.

Q. Do you know Newton Lumbra? A. I do.

Q. How long have you known him? A. Well 195
since he was a very small boy. I wouldn't attempt to say in years.

Q. You were living in Montgomery the same time he was? A. I lived there,—yes.

Q. Did Mr. Lumbra work for you at some time? A. He did.

Q. Describe to the jury his general appearance and his activities before he enlisted. A. Well I considered him a normal, healthy boy; a boy full of fun and jokes and this and that; as all

196 the rest of the young men around town that were of the same disposition and nature. I considered him, as I say, strong and healthy.

Q. Was he active all the while? A. Active.

Q. Did you know anything about his employment before he enlisted in the army? A. I wouldn't want to state in particular, give dates and so on. I know he worked for me in haying and afterwards worked for the Nelson Hall Co.

Q. Describe the manner in which he did his work for you in haying? A. Satisfactory.

197 Q. Did there come a time when you heard he enlisted in the army? A. Yes.

Q. Can you recall about when that was? A. Yes, I think it was in '17.

Q. Do you also recall the time when he came home? A. I do.

Q. How soon after he arrived home, did you see him? A. I wouldn't attempt to say that; possibly within a week; may be within a day.

Q. Did you notice a marked change in regard to his appearance after he arrived home? A.

198 Why, he was soberer and slower.

Q. Go ahead and describe in detail to the jury how his appearance impressed you. A. Well he appeared older,—in other words, a great deal soberer in his actions and so on and so forth. I think his face was a great deal more flushed than it was before he enlisted.

Q. Was he as active as he was before? A. I never saw him as active.

Q. What do you mean? A. I never happened to see him when he was fooling or scuffling or anything of that sort afterwards.

Q. Did he appear to you to be a man that had undergone some hardship or something drastic had happened to him? A. Well as to his hardships or anything of that sort, I cannot say. He appeared to me slower and soberer, I will put it that way; different. As to his hardships I probably was told by him about all that. 199

Q. Would you say this condition that you have described was due to the fact that he was older when you saw him or would you say it was more than that? A. No, I wouldn't say it was on account of age. I would say it was possibly from what he had been through. 200

Q. Did you notice any difference in expression on his face? A. I noticed his face was flushed a great deal more. I wouldn't want to go into technical so and so as to his face. He appeared tired,—put it that way.

Q. Did you know of his working steady for anyone there in Montgomery after he returned? A. No.

Q. Did you know of his attempting to work at different times and places? A. I know—yes, that he did work or try to work. 201

Q. You live right there in the village, did you? A. I did.

Q. Did you notice whether he was around the village more after he returned than he was before he went away? A. He was, I think.

Q. You think he was? A. Yes.

Q. Do you know where he worked? A. After he come back?

Q. Yes. A. As I say I think I know of his working for the Nelson Hall Co. in the mill.

202 CROSS EXAMINATION by Mr. Fitzgerald:

Q. Mr. Foley, this haying you have testified to, was that before or after the war? A. Before.

Q. Did he ever work for you after the war? A. No, sir.

Q. Before the war did he work for you on other than this one occasion when he did some haying for you? A. I think he worked for me during two seasons of haying.

Q. On how many occasions did you employ
203 him? A. On two.

Q. Do you recall what years they were? A. I think it was in '13 and '14, the summers of '13 and '14.

Q. Somewhere along '12, '13 or '14? A. Yes.

Q. Do you know whether or not he worked regularly before the war? A. Well as to my making statement as to his working regularly before the war from the years of '15 to '17 I couldn't say positively. I think he did work, but
204 his occupations and so forth I don't think was regular employment, only while he was in the mill.

Q. Do you know whether or not he worked any more regularly before the war than he did after the war? A. He wasn't with me when he was working after the war, so I won't say.

Q. Do you know whether or not he did, Mr. Foley? A. Absolutely not.

Q. You do know he didn't work regularly during those years '15, '16 and '17? A. Occupa-

tions were changed necessarily and there would 205
be spaces in between; work for me haying and
then go in the woods.

Q. You testified he was around the village more after the war than he was before. Isn't that owing to the fact he moved into the village after the war? A. Right after his return I think he lived around the village.

Q. And he stayed there until for a couple years, 1921 or '22? A. I couldn't say where he was all those times.

Q. When did you last have knowledge of his 206
condition or do you have any knowledge of his physical condition? A. Why, sometime in '20 or '21 he came into my house and wanted me to make application for a pension for him and told me all about his condition.

Q. What did he say about his condition at that time? A. Bad.

Q. What were his ailments? A. Headache, backache; as I remember, backache as well as head; in back here (indicating).

Q. Did he tell you anything about having con- 207
vulsive seizures at that time? A. No, sir.

Q. Or these dizzy spells? A. Not that I remember.

Q. Didn't he complain of rheumatism as one of his troubles at that time? A. I don't recollect that he did.

Q. You spoke about Mr. Lumbra changing after the war. Has he changed very much since then? Excluding the natural wear and tear of twelve years, is he changed much today from his appearace in 1919? A. In what respect?

208 Q. General appearance. A. Yes, he is.

Q. In what way? A. Why, he's older.

Q. Naturally. A. And I think he's in a shakier condition than he was then.

Q. What do you mean by a "shakier condition"? A. I noticed sitting here he was very shaky.

Q. In what ways? A. Hands shaking and the muscles of his body shaking when he was here on the stand.

Q. Is he heavier or lighter than he was in
209 1919, do you think? A. Well I would see him then—I should say about the same as to weight. He might be a little heavier but not much.

Q. When he came home from the army you said he was soberer? A. Yes.

Q. Isn't it true, Mr. Foley, that that was also true of many of the boys who were over there? A. Sure; yes, sir.

Mr. FitzGerald: I think that is all.

RE-DIRECT EXAMINATION by Mr. Sylves-
210 ter:

Q. You say he did complain to you as early as 1920 in regard to his pains in his head? A. He was at my house twice asking me to make application for a pension; telling me all about his troubles.

Q. Did he mention at this time about the pains in his head? A. Yes.

Q. Did he tell you how long he had those pains? A. He told me a whole lot of stuff I cannot remember distinctly now.

Q. Did you know of his working in the woods before he enlisted? A. I think he worked in the woods, yes. I wasn't in the woods with him but I know well enough he was. 211

Q. Did you ever hear any complaints of any sort from his employers before he enlisted with regard to his loafing or being unsteady? A. I wouldn't say that I did.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. What year did he work in the woods, do you know? A. I won't say,—somewhere '16 or '17; '16 I should say. 212

Q. For how long a period? A. I wouldn't say how long he did work.

Q. A few days, a week or a year or how long? A. I wouldn't say.

Q. Did you ever hear complaints if he didn't work after the war? Did any of his employers complain to you that he wasn't working right? A. Naturally wouldn't, no.

Q. Did you ever know of Mr. Lumbra drinking to excess? A. He never drank in my presence. 213

The Court: Now this is being introduced as to this man's condition?

Witness: I know nothing of his drinking.

*C. H. Dow, for Pltf., Direct.*

214 CHARLES H. DOW, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. Where do you live Mr. Dow? A. Richford.

Q. How long have you lived there? A. Eight years.

Q. Previous to the time you moved to Rich
215 ford, where did you live? A. Montgomery.

Q. How long did you live in Montgomery? A. Always lived there. I was born and brought up there.

Q. Did you know Newton Lambira? A. Yes.

Q. How long have you known him? A. Since about 1913 I would say.

Q. Did he at one time work under you? A. Yes, he worked, I think it was in 1916.

Q. What position did you hold at that time? A. I was foreman.

216 Q. For whom? A. The Nelson Hall Company in the veneer factory.

Q. He worked for you in 1916 you say? A. Yes.

Q. Describe to the jury what kind of a workman he was, general appearance and health and all about him. A. He appeared to be a good rugged man and his work was satisfactory. He did his work all right and we kept him on the job for six or seven months I would say.

Q. Did he work steady during that period of time? A. Yes.

*C. H. Dow, for Plf., Direct.*

Q. What kind of work was he doing? A. 217
Rolling logs.

Q. Was that heavy or light work? A. That was heavy work, we considered it.

Q. A job where it was necessary to have a good rugged man? A. A good strong man, yes.

Q. Do you recall the time he enlisted in the army, he among others? A. Yes. I don't, I recall the time, yes, sir.

Q. Do you recall the time he came home after being away for a period of time? A. Yes.

Q. Did he work for you after he arrived 218
home? A. A short time.

Q. When was that? A. 1919.

Q. You say a short time. Just how long a period of time do you mean by that? A. I can not remember, but I know he didn't work very long because he was unsteady and we didn't keep him on the job; we tried him in other places.

Q. How did he work while on the job? A. Not as good as before. He wasn't the same kind of a man. We put him on the same work when he came back and he wasn't capable of doing it and 219
we changed him on another job and he did that better but he wasn't steady; didn't work every day, so we didn't keep him.

Q. Was it necessary by reason of his unsteadiness, that you discharge him? A. Yes.

Q. Did he complain to you about his physical condition? A. I don't remember that he did; that was his excuse for not working, that he wasn't well.

Q. Was it apparent that there was something

220 that was ailing him, bothering him? Could you see there was something ailing him? A. Well I took his word for it, that there was something the matter.

Q. Did you see yourself some change in him? A. Yes, a change. He didn't act like the same fellow; he didn't do his work the same.

CROSS EXAMINATION by Mr. FitzGerald:

Q. What camp were you in charge of as foreman? A. Camp? No, in the veneer factory.

221 Q. He worked for you in this veneer factory? A. Yes.

Q. And what were his duties when he returned from France? A. His duties were the same; we gave him the same work to do.

Q. What month did he apply for work up there? A. What month?

Q. Yes. A. I don't know.

Q. In the spring of the year, fall or winter or summer? A. Well I think it was in the winter.

Q. The winter following his discharge from
222 the army he went to work for you? A. Yes.

Q. What had he done in between the time of his discharge until then? A. I don't know.

Q. Might it have been in the summer he went to work for you when he came back from the army? A. No, I am pretty sure it was in the winter.

Q. How long a time did he work for you in 1919? A. I cannot tell.

Q. Was it a couple days, a couple months or a couple of years? A. I might say three or four weeks.

Q. Then he was transferred to another department, was he? A. I think so, yes. He was taken from my department, yes. 223

Q. Then he was not discharged at that time, was he? A. No.

Q. And do you know what his duties were in the other department? A. No.

Q. Do you know whether or not he worked regularly there? A. No.

Q. Do you know whether or not he worked regularly for the rest of the time he stayed in Montgomery Center? A. No. 224

Q. You don't know much about him, do you? A. No.

(5:15 p. m. adjourned.)

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(Tuesday, April 19, 1932, 9 a. m.)

LOUIS J. PAQUETTE, called as a witness by the plaintiff, being duly sworn, testified as follows: 225

Direct Examination by Mr. Sylvester:

Q. What is your full name Mr. Paquette? A. Louis J. Paquette.

Q. You live where? A. St. Albans.

Q. How long have you lived there? A. Over forty years.

Q. What is your business? A. Proprietor of a bowling and billiard alley.

226 Q. Did you hold some official position in the city at some time? A. I was city commissioner two terms.

Q. Are you acquainted with Newton Lambra? A. I am.

Q. How long have you known him? A. Since about 1924.

Q. Did you at sometime hold some position or office in the American Legion? A. I was Commander of the Legion from 1924 to '25.

227 Q. During the time you were Commander, was your attention called to Mr. Lambra's case? A. It was.

Q. And as a result of that, what did you do, if anything? A. I investigated the case and found out he needed help.

Mr. Fitzgerald: I object to what the investigation may develop. He may testify to what he knows but not what some one told him.

The Court: Of course, that is what he means.

228 A. (continued) which I had help given him.

Q. What did you do by the way of helping, Mr. Paquette? A. Why I had him sent to the Veterans Bureau and had him sent to the hospital and had his family taken care of for the time being.

Q. What did you do for his family? A. We bought groceries and paid his rent and bought some coal.

Q. What hospital was he sent to, if you know? A. Chelsea Naval Hospital.

*L. J. Paquette, for Plff., Direct.*

Q. How long a period of time did this investigation extend over, where you were in immediate contact with him? A. About two years. 229

Q. Did you learn from your investigation anything about his physical condition? Answer yes or no. A. Yes.

Q. Did you know where he was working at that time? A. He was working at the railroad at the time.

Q. Did you also learn through your investigation whether he was working steady or not? A. Yes. 230

Mr. FitzGerald: I would like to have him tell the source of the information before he answers the question.

Mr. Sylvester: He can answer yes or no.

Q. Did you find he was or was not, Mr. Paquette?

Mr. FitzGerald: I object to that testimony as being entirely hearsay.

Mr. Sylvester: Not necessarily. It is information that was revealed to him during the investigation and things he observed, knew. He might have seen the records,—known of the man being at home different times. 231

Mr. FitzGerald: If there's records to that effect, he should produce them. This is purely hearsay.

The Court: No, I don't think so. Ask him the question "Was he working steady or spasmodically?"

232 Q. Was he working steady, Mr. Paquette? A. To my knowledge he was not.

Q. Is that one of the reasons why you furnished help to his family? A. It was.

Q. Do you now know of your own knowledge what he was suffering with at that time? A. I do at the present time but I didn't at that time.

Q. What was it? A. He was suffering from seizures or epileptic fits.

Q. Did you ever see him have one of these fits? A. I did in 1931.

233 Q. Tell the jury where it was and all about it and describe the position he was in and how it affected him. A. I was in my place of business and was talking with another gentleman and Mr. Landra was sitting on beside of us, although he was not in the conversation or anything. I had my back partly turned towards him, and while we were talking, I heard a kind of a squeal out of him and I kind of turned around and looked at him and he was just stretching out, going into one of those fits. I kind of got away from him
234 because it was the first time I really see one so close to me, but his brother-in-law happened to be there and he pulled him down and put him on the floor and loosened his collar and put some water on his head. In probably fifteen minutes or so he came to and he took him home.

Q. Now describe his breathing and how he looked when on the floor. A. Why he breathed very heavy; he frothed at the mouth a little and he really looked like a dead person.

Q. That is the only one of these seizures you have ever seen him in? A. Yes.

Q. Do you hire any help in your business? A. I do. 235

Q. Have you ever had any experience in hiring help? A. I have.

Q. Now do you know any work that this man could do, being subject to these seizures,—that is, do safely? A. No.

CROSS EXAMINATION by Mr. FitzGerald:

Q. You said as a result of this investigation of yours you had Mr. Lambra go to the Veterans Bureau? A. Yes, sir. 236

Q. Did you know he had had contact with the Veterans Bureau in 1920? A. I did not.

Q. Well if he did, do you think you were the cause of his going to the Veterans Bureau? A. I do.

Q. Even though he had been there in 1920? A. I didn't know he had been there. I was led to believe he had never had anything to do with the Veterans Bureau.

Q. That is what he told you at that time? A. I couldn't say that but something seemed to tell 237 me I was led to believe he had not.

Q. Something that was said at that time led you to believe he had had no contact with the Veterans Bureau prior to that time? A. Yes.

Q. If that was in error, it is possible other things revealed by your investigation might be in error? A. I wouldn't say that.

Q. Even though that was in error, you still say that was right? A. I don't get your meaning.

238 Q. If you knew he filed a claim for compensation in '20 and had had contact with the Bureau and had been examined by Veteran's Bureau doctors from time to time from 1920 to 1924, your report was wrong when you thought he never had any contact with them? A. No; that isn't anything out of the ordinary because there were a lot of ex-service men had been examined and let their case drop and then not take it up for four or five years.

Q. You said he had had no contact with the
239 Bureau? A. Yes.

Q. If he did have that contact, you were misled when you believed he had no contact? A. I never asked that question.

Q. What led you to believe he had had no contact? A. I couldn't say.

Q. It was just a guess? A. Probably.

Q. Then is the rest of your investigation also a guess? A. No, because I interviewed the family and I don't really think they lied to me; the
240 circumstances led me to believe they needed the things.

Q. I want to know where you got the information and what led you to believe he had no contact with the Bureau? A. Because he wasn't being taken care of; and that is why I thought he had no contact.

Q. How do you know? A. Because in the circumstances he was not drawing any compensation.

Q. Is compensation necessary for medical treatment? A. No, sir.

Q. Then you don't know whether he was having medical attention or not? A. No, sir. 241

Q. When you stated he was not having any contact with the Bureau, you may have been in error? A. I might have but I don't think so though.

Q. You said that he was not working steadily to the best of your knowledge? A. Yes, sir.

Q. When did you first know Mr. Lumbra? A. Sometime in 1924.

Q. And you knew him up through what years? A. '24, '25, up to the present time. 242

Q. You know he was not working steady through '24, '5 and '6,—along in there? A. Yes, sir.

Q. You are sure of that. This seizure you spoke of him having in 1931, do you remember that very clearly? A. Yes.

Q. How about his breathing at that time? How did he breathe? You testified he had labored breathing,—heavy breathing,—is that correct? A. It looked to me.

Q. Then the testimony you gave in the last trial must have been incorrect. Question by the Court: "How about his breathing?" Answer—"He didn't look as if he was breathing much." That isn't heavy breathing, is it? A. I wouldn't say that. 243

Mr. FitzGerald: That is all.

RE-DIRECT EXAMINATION by Mr. Sylvester:

Q. You made a rather thorough examination in this case at that time? A. I did to the best of my knowledge.

*N. W. Lumbra, re-called for Pltf., Cross.*

244 Q. And as a result of that, you got him in contact with the Veterans Bureau? A. Yes.

Q. And he was sent to the hospital? A. I did.

Mr. Sylvester: That is all.

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NEWTON W. LUMBRA, re-called.

Cross Examination by Mr. FitzGerald:

245 Q. Mr. Lumbra, did this accident or injury you received in France,—tell us more about that,—tell us the circumstances surrounding it. A. When I got hurt do you mean?

Q. Yes. Speak louder. A. That morning,—we were out all night in the trenches, and we came in at daybreak and had just gotten in the dugout, when this bombardment started and we had to return to the trenches, and as we were out there,—I think it was around half past eight when
246 I come back in, and when I got to the end of the trench which I had to come up out of and come over the top of the ground, the short trench that led to the dugout,—that is where the explosion occurred, and it threw me—from what the boys told me, they picked me up in this short trench that led down into the dug out. They picked me up there and carried me in.

Q. Go ahead. A. And when I came to I was in the dugout and that ankle (indicating) was fractured or sprained.

*N. W. Lumbra, re-called for Pltf., Cross.*

Q. You say that ankle was fractured? A. 247
Either fractured or sprained.

Q. Which was it? A. I guess it was a severe sprain they had it on the record.

Q. You testified yesterday it was broken, which is correct? A. I think it was on the record of the hospital it was a severe sprain. When I come to I was very shaky, and sweat—big beads of sweat coming off me, and I remained there—and got First Aid—until that night, and then they took me to the hospital along with the rest of the casualties. 248

Q. This was in the seventy-five foot dugout the boys testified to yesterday? A. Yes.

Q. What treatment did you get as first aid? A. Well, they bandaged up my ankle and that is about all they could do for me at that time I guess.

Q. How long were you unconscious? A. I don't know. A man who is unconscious don't know how long he is unconscious.

Q. Was it all day? You know whether or not you regained consciousness, don't you? A. 249
I don't know the day, no.

Q. A comparatively short time, is that it? A. I don't know; I couldn't say.

Q. You know it was about eight-thirty when you went in there? A. I don't know when I come to.

Q. Was Mr. Bell there when you come to? A. He wasn't there when I came to. He came later.

Q. About what size was this crater testified about? A. After I looked at it, along towards

250 night, as near as I could figure that was the one, of course, I couldn't be sure because there was a lot of them, but the one that I figured, was I should say twenty foot across and probably twelve foot deep.

Q. How far was that from the dugout? A. It was probably fifty or sixty feet.

Q. Was it beyond the trench that you came through? A. Yes, just beyond; just below that.

Q. Just beyond the trench you came through. About how deep did you say that was? A. I
251 should say down twelve foot.

Q. About twenty foot across and twelve feet deep? A. Yes.

Q. How long were you in the hospital at that time? A. Well I went in—it was on June 17 I think this happened;—I am not sure, either the 16th or 17th.

Q. The middle of June somewhere? A. Yes, and I came out—they were relieved from Chateau Thierry when I came out; I couldn't remember the date but it was sometime the latter part of
252 July or August.

Q. You rejoined the outfit after they came out of Chateau Thierry? A. Yes, I did.

Q. They were back at the Rest Camp getting replacements when you rejoined them? A. Yes.

Q. When were you next in action? A. St. Mihiel.

Q. Do you recall how you went to the St. Mihiel front from the Chateau Thierry sector? A. How we went?

Q. Yes. A. We went part way by train and 253
we hiked some of the way.

Q. And whether that hiking was way back where you marched in the day time? A. No, at night I think we went, at St. Mihiel; not all night but during the night we hiked.

Q. All your hiking was at night? A. Mostly.

Q. Wasn't one day's march in the day time? A. At St. Mihiel?

Q. No, going to St. Mihiel from Chateau Thierry? A. No, I think not.

Q. When did you first suffer from these weak 254
spells you testified to? A. While I was in the hospital.

Q. What hospital was that? A. It was some base hospital; I couldn't say which one it was.

Q. It was some distance back, wasn't it? A. Yes.

Q. And did you make any report at that time to any of the doctors there? A. No, I did not.

Q. How did those spells affect you? A. I used to get dizzy and black—come black in front of me—weak. 255

Q. Did you stagger? A. Well, I would sit down when I felt these spells come on to me.

Q. Well, if you were walking along, would you stagger? A. Well, I might some, yes.

Q. Did you ever complain after you returned to the outfit, did you ever complain to any of your superiors about these spells? A. No, I did not.

Q. Did you complain to any of your comrades—associates in the service, about it? A. No, I didn't say anything to anybody about it only

256 the Captain was talking to me one day and wanted to know how I felt, and I told him.

Q. How long was that after you got back? A. Right after I got back to the outfit.

Q. Was that two weeks, a day or a month or how long? A. Only two or three days after.

Q. Who was that Captain? A. I think his name was Thompson; I am not quite sure, Thompson or Thomas.

Q. Is he the officer under whom you served until you returned home? A. No, not all the
257 time I don't think. Jack Wood was in command when we returned home.

Q. When did he take command? A. Just before we left France.

Q. Was he with your outfit before? A. No, he got transferred to our company just before we left France and was made Captain.

Q. During these marches that you had, and you did march with the outfit after you returned? A. Some of the time and some of the time I rode.

258 Q. That is, I meant you moved with the troops? A. Yes.

Q. During those marches that you made over there, did you have any of these weak spells? A. Yes, I did.

Q. And nobody noticed them? A. I just struggled along the best I could and stayed with them.

Q. And they never noticed you had these dizzy spells? A. I don't know whether they noticed it or not; I didn't tell them.

*N. W. Lumbra, re called for Plff., Cross.*

Q. You say you are sure none of this hike 259
toward the St. Mihiel was in the day time? A. I don't, not to my recollection now.

Q. Well, if you said it was in the day time last trial which is correct?

Mr. McNamara: That isn't a fair question, because we know what was testified to before was not.

The Court: Suppose it isn't fair?

Q. On page 72 of the transcript "During that hike you marched some long hike, didn't you?" Answer "Yes". Which would be cor- 260
rect? A. I think in the other trial when you asked me that you were referring to something else.

Q. Which would be correct? A. To my recollection we didn't hike in the day time going to St. Mihiel.

Q. You never made any complaint to any of the doctors? A. No, sir.

Q. Or to the fellow soldiers at all? A. No, sir.

Q. Now before the war you were working in 261
the woods, were you? A. Yes, sir.

Q. For what company? A. The Nelson Hall.

Q. How many camps did they have up there? A. Why—

Q. Several or just one? A. Oh, they had more than one.

Q. Which camp were you working in? A. The camps were numbered; I don't recall now the number of the camp.

Q. Who was your foreman? A. Well, the

262 head foreman I think was Charles Donnelly. He wasn't in the woods all the time.

Q. Who was his assistant in immediate charge of you, if you know? A. Well, they was a number of different foremen up there.

Q. In your camp there wasn't. A. I think Joe LaFrank was the one up there when I worked there.

Q. You worked for Mr. LaFrank? A. Yes.

Q. For how long a period did you work there? A. The year they built that log hauling
263 road—that took a good part of the summer, and was in camp all winter.

Q. What year was that in? A. Well, it was in '14 or '15, I cannot recollect just which.

Q. '14 or '15? A. Sometime along there; before I went in the service quite a while.

Q. They built a log haulers' road? A. Log haulers they used up there to draw the logs.

Q. That was along about '14 or '15? A. I should think it was.

Q. You went in there what month? A. They
264 started this road in the summer time.

Q. When did you go in? A. I went in when they started to build the road.

Q. You started to work in there about what month then? A. Well, I couldn't say what date it was or exactly what month.

Q. June, July, March or April or where was it? A. I think along June or July somewhere.

Q. You worked there steadily until when? A. Until we got in the woods. The road was built, and built the camp and stayed there all winter.

*N. W. Lumbra, re-called for Pltf., Cross.*

Q. What did you do in the winter? A. Cut logs. 265

Q. Again working for Joe LaFrank? A. He wasn't boss when they built the road. I was trying to think of his name.

Q. You worked for that full winter for Mr. LaFrank? A. Yes.

Q. You stayed in there all winter? A. Yes.

Q. When did they start cutting? A. Along the latter part of September or October.

Q. They finished up when? A. Well, they finished up I should say January or February. 266

Q. And then you came back when you finished cutting? A. We came out I think the latter part of March.

Q. What did you do from March? A. They drew logs all the time and they had to have men up there. I used to help them load; I didn't draw logs.

Q. Were you on the payroll at that time? A. Yes.

Q. You worked every day? A. Yes.

Q. And you worked from July until March? 267
A. Yes, sir.

Q. Where else did you work before the war? That takes care of nine months about? A. I worked in the mill for Nelson Hall before the war.

Q. What years did you work in the mill? A. I think it was in '16.

Q. Well, what did you do from 1915 to 1916? A. I think I worked for Mitchell Brissette in the woods cutting logs.

*N. W. Lambra, re-called for Plff., Cross.*

268 Q. Was that also a Nelson Hall development? A. He had a job for Hall I think at that time.

Q. What year was that, what period was that? Fall or Spring? A. It was during the winter.

Q. That would be from the fall of '15 to the spring of '16, is that it? A. Yes.

Q. Then what did you do from the spring of '16? A. That is when I went in the mill to work.

Q. You went in the mill in the spring of '16? A. Yes.

269 Q. And you stayed there until you went in the army? A. No, I was there six or eight months I think and then I went to work for my brother. I was working for my brother on the farm when I went in service, for Bert Lambra; he lived at South Richford then.

Q. What did you do in the year '13 and '14 if you know? A. Well, it is pretty hard for a man to go back and tell. I did a number of different jobs.

Q. Part time here and part time somewhere
270 else? A. Yes.

Q. When you came home you again went to work for whom? A. Nelson Hall.

Q. At the veneer mill? A. Yes.

Q. And you worked for him how long, or them? A. Well, I was there—I went to work about three or four months after I came back and worked the rest of '19,—that is, when I was able to work, and '20, and then I worked some in '21; not very much.

Q. '19, '20 and '21 you worked in with Nelson Hall? A. Yes, sir.

*N. W. Lumbra, re-called for Plff., Cross.*

Q. Then you left Montgomery Center in '21? 271
A. Yes.

Q. And then where did you go? A. Richford.

Q. For whom did you work there? A. For the same company there a while that winter.

Q. How long did you work there? A. I don't think I worked over a couple months that winter, and then I went up to my sisters and stayed a while.

Q. Then where did you go? A. I came to St. Albans. 272

Q. And have been there since? A. Yes, sir.

Q. And you went to work for the C. V.? A. Yes.

Q. When did you start there? A. I think it was in July, 1922.

Q. You left Montgomery Center in when? A. 1921.

Q. What month? A. It was along the latter part of the year.

Q. September or October, in there? A. Pretty near 1922 when I went to Richford. 273

Q. And you had been working in Montgomery Center up until the time you left there? A. Yes.

Q. Then you went to Richford? A. Yes.

Q. And worked there that winter? A. Some, yes.

Q. And then came down to St. Albans? A. Yes.

Q. And you started working for the C. V. in July? A. Yes.

*N. W. Lumbra, re called for Plff., Cross.*

274 Q. And you remained in their employ until when? A. 1929.

Q. When did you go to Mechaniesville? A. I think it was in '23 or '4; '23 I guess.

Q. Somewhere '23 or '4, in there? A. Yes.

Q. You resigned from the C. V. at that time, didn't you? A. Yes.

Q. And how long did you work for the B. & M. at Mechaniesville? A. I think I was there about six months.

Q. Then you came back to the C. V. again? A.
275 Yes.

Q. Where was your work more regular, for Nelson Hall Co. or the C. V.? A. Why, I should judge it was about the same.

Q. Haven't you stated your condition has grown gradually worse? A. Well, it has.

Q. Then wouldn't you lose more time? A. I think I did lose more time there.

Q. You lost more for the C. V. than you did for Nelson Hall? A. Yes.

Q. Now you returned to your outfit to go
276 back over seas again,—you returned to your outfit in July or August; can't you come a little closer to that? A. When they come out of Chateau Thierry; I cannot remember the date.

Q. Do you recall the date when you were in this conversation with Captain Thompson? A. I think it was around the first part of August.

Q. Before you went into the service, were you employed somewhere rolling logs? A. Nelson Hall Co.

Q. And how many hours a day did you work

there? A. I don't know whether they were work- 277
ing nine or ten hours,—I don't recollect just now.

Q. How much were you paid? A. Well, my pay wasn't very big before I went in the service; I don't think it was over ten dollars, ten or eleven dollars a week.

Q. What were you paid at the veneer mill when you came back? A. When I came back?

Q. Yes. A. I think it was around three dollars a day, or something like that.

Q. How much would that be a week? A. Well, six days a week would be eighteen dollars. 278

Q. When did these dizzy spells that you have complained of, develop into these seizures, Mr. Lumbra? A. Either the latter part of 1922 or the first part of '23, somewhere in there.

Q. When did you have your first seizure? A. I think it was—the first part of 1923 is my recollection.

Mr. Sylvester: I want to know what he means by "seizure"?

The Court: He means what the word implies. 279

Mr. Sylvester: Whether he became unconscious?

The Court: You ask about that later. You shouldn't interrupt this examination for that kind of thing.

Q. How did you feel after these attacks? A. I didn't feel very good. I felt sore,—lame.

Q. This soreness and lameness,—where did that affect you? A. All over.

Q. Was it muscular or in your joints or where? A. It seemed to be in the muscles.

*N. W. Lumbra, re-called for Plff., Cross.*

280 Q. All your muscles were affected? A. It seemed to be from a strain you know.

Q. How long would that last? A. Sometimes it lasted longer than others; it depended on how many seizures I had.

Q. Take an average. A. Sometimes three or four days; sometimes longer.

Q. Now when you first filed claim for compensation,—you did file a claim, didn't you? A. Yes.

Q. Do you recall what your complaint was then? A. No, I don't.

281 Q. Well, whatever was troubling you, you told, didn't you? A. Well, I had lots of different things troubling me at that time. I had bronchial trouble, and some rheumatism,—arthritis or whatever they call it.

Q. You were claiming compensation in order to connect your difficulty with service, weren't you? A. Well, I didn't know much about it then, only just what somebody told me, and I filed a claim,—that's all.

Q. You knew it had to be service connected?

282 A. I didn't know a thing about it; I didn't know any more about compensation than I did about the moon.

Q. When you filed that claim stating certain disabilities, didn't you? A. I must have.

Q. Those disabilities were the ones that were most annoying at that time, is that right? A. Well, these dizzy spells, I was having, I didn't pay much attention to them because I thought it was just something that was going to work away; something that was temporary and would gradually go away after a while.

Q. You still thought they were going to wear away. When did you file this claim? A. I think in '20. 283

Q. You had been having these dizzy spells from what period of time? A. From the time I was in the hospital.

Q. That was in the summer of 1918? A. Yes.

Q. You had these spells for two years and thought they were going to wear away? A. Yes, I didn't know; I am not a doctor.

Q. That is what you just said, is that correct? A. Yes. 284

Q. And you made no mention of them at all? A. Well, I went to Dr. Hunt.

Q. You told Dr. Hunt about these dizzy spells? A. I went to him to have him take my blood pressure the first time because I thought it was high blood pressure that caused it.

Q. Didn't you testify yesterday you didn't have a doctor until 1926? A. No, I didn't. I went to Dr. Hunt in 1919, I testified yesterday.

Q. You had been working for the Central Vermont how long before these attacks caused you to lose time? A. Well, I had lost a lot of time from the time I began there right up through. 285

Q. You began losing time as soon as you started there? A. Yes, soon after.

Q. Well, if your testimony in the first trial—

The Court: Well, we won't go into what his testimony was.

Q. What was your testimony in the first trial as to when you first had a doctor? A. My recollection is better now than it was in the first trial.

*N. W. Lumbra, re-called for Pltf., Cross.*

286 Q. What do you say now? A. When I first had a doctor?

Q. Yes? A. 1919.

Q. Then you said in the first trial, page 73—"When did you first have a doctor attend you?" "Well, about 1926." Then that was wrong? A. Yes, it was.

Q. What did Dr. Hunt treat you for? A. Nerve trouble and bronchitis.

Q. When was the first time you had treatment for these dizzy spells or seizures that you now
287 have? A. Well, that was 1926.

Q. When you reported for treatment in 1926 did you tell the doctor how long you had been having those attacks? A. No, I don't think I said anything about it.

Q. Why did you go to him? Didn't you go to him for relief? A. Well, they sent me to him.

Q. Who? A. The Veterans Bureau.

Q. In '26? A. Yes.

Q. To whom? A. Dr. Herman.

Q. Had you made a report to the Veterans
288 Bureau as to what your condition was? A. They had examined me,—I suppose they knew.

Q. You didn't tell them? A. Certainly I told them.

Q. Then when you went to Dr. Herman you told him what your condition was? A. I gave him my letter of authority they sent me, and he took it and read it, and done what I suppose he wanted to.

Q. Who examined you for purposes of compensation in '20? A. Dr. Herman.

*N. W. Lumbra, re-called for Plff., Cross.*

Q. Did you tell him at that time what your trouble was? A. I got started to tell him but he wouldn't let me finish. 289

Q. He wouldn't let you finish? A. No.

Q. When you went to him in '26 did you start to tell him then? A. Dr. Herman—I am going tell you,—is a very peculiar man. When you start to try to tell him something you ain't going to get very fur with it if he knows it. He cuts you off.

Q. You didn't tell him for that reason? A. I tried to tell him lots of things, lots of times, but I never made out. 290

Q. Were you ever treated by doctors other than Dr. Hunt and Dr. Herman? I mean treated,—I don't mean Veterans Bureau examinations. A. Only in the Veterans Bureau hospitals.

Q. That is the only treatment you had, outside of the Government full time doctors; was that by Dr. Hunt and Dr. Herman, is that correct? A. Yes.

Q. When did you first file claim for compensation? A. 1920. 291

Q. Did you file any other claims? A. Well, I might have; I don't recollect now.

Mr. FitzGerald: I would like to recall the plaintiff later to identify certain papers that I don't seem to have here,—in order to let the trial go along?

The Court: Yes, you may do so.

292 RE-DIRECT EXAMINATION by Mr. Mc Namara:

Q. You have told about different employments that you held at various periods prior to the war, starting around '13 and '14, up until you went in the army. Do you know if you have told us all the jobs that you had? A. Well, it is pretty hard to go back all those years and remember just what jobs you had.

Q. In answer to Mr. FitzGerald's question, did you tell him anything about working for Mr.
293 Foley who testified here yesterday? A. No, I don't think I did.

Q. Did you work for him at some time? A. Yes, I worked for him one year drawing logs before Arthur Hutchins' mill burned down, and I worked for him two seasons in haying.

Q. Did you perhaps have other employments, in the same way you now forgot and may not have told us about? A. Yes.

Q. How were you, did you work steadily or otherwise, from '13 up to '17? A. Yes, sir.

294 Q. Worked practically all the time? A. Yes, sir.

Q. When you went to Dr. Hunt did you explain to him just what was bothering you? A. Yes, I wanted him to take my blood pressure, I thought it was blood pressure.

Q. You told him how your head felt and about these seizures at that time? A. Yes.

Q. And Dr. Hunt did treat you for nervousness? A. Yes.

Q. Was there some reason why you didn't call

a doctor in the period 1922 to '6 when the Govern- 295
ment first authorized you to go to their doctor? Was there some reason you didn't? A. Well, I tell you, the more I said about it to the doctor or anybody else, I thought wasn't going to get me anywhere; I figured I was going to lose my job anyway, and I thought if I said something I would lose it quicker.

Q. Was your financial condition such — A. I couldn't afford a doctor.

Q. This was when you had to have help from the Legion? A. Yes.

Q. You were on the payroll of the C. V.? A. 296
Yes.

Q. But during this time you had to get this help from the American Legion? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. As to your residence when you came home, Mr. Lumbra, where did you go to live? A. With my mother.

Q. Where was that? A. Montgomery Cen- 297
ter.

Q. How long did you live with your mother? A. I lived with her until she died.

Q. How long was that? A. She died in '20, September.

Q. September, 1920? A. Yes.

Q. When were you married? A. I was married in the spring of 1920.

Q. And you and your wife made your home with your mother? A. Yes.

*N. W. Lumbra, re-called for Pltf., Re-cross.*

298 Q. And after your mother died, where did you live? A. We went to live with her people.

Q. With her people? A. Yes.

Q. Mr. Lumbra, have you ever been arrested? A. Yes.

Q. For what? A. Intoxication.

Mr. McNamara: I object to that.

The Court: Suppose he has been arrested? That isn't admissible.

Mr. FitzGerald: The second question would make it admissible.

299 The Court: Come to the second question and leave out the first one which is inadmissible.

Mr. McNamara: The second one is also inadmissible. We ask that be stricken.

The Court: I won't strike it.

Q. Have you ever been arrested for drinking? A. Yes.

Mr. McNamara: I object to that.

The Court: How is that any better?

Mr. McNamara: It is worse.

300 Mr. FitzGerald: It is quite admissible in this case.

The Court: If a man has been arrested, is never admissible. If he has been convicted of some crime, it is sometimes admissible, but a great many people who have been arrested, have been acquitted.

Mr. FitzGerald: Yes, your Honor. May I withdraw the question?

The Court: Certainly.

Q. Withdrawn.

*N. W. Lumbra, re-called for Pltf., Re-cross.*

The Court: Certainly you can; if you don't withdraw it, I will withdraw it for you. 301

Q. Have you ever plead guilty to the charge of drunkenness? A. Yes.

Q. Have you ever plead guilty to the charge of non-support?

The Court: How is that admissible?

Mr. McNamara: We object to that.

The Court: You are pretty late.

Mr. FitzGerald: I offer to show he was arrested for non-support by his wife, who knew his condition. If he was not able to work, she wouldn't have prosecuted him. 302

The Court: That is not admissible. How is it important whether he plead guilty to being intoxicated?

Mr. FitzGerald: It is important for this reason your Honor: In this case we hope to show that his present condition might be brought about by excessive use of alcohol.

The Court: Why wouldn't it be better to show that alcohol is the cause of his condition to begin with? 303

Mr. FitzGerald: You cannot show that from lay witnesses.

The Court: You can put on professional witnesses.

Mr. FitzGerald: We hope to your Honor.

The Court: You said that in the other trial and you didn't.

304 Mr. FitzGerald: Two doctors testified to it.

The Court: They said it might. If the fact was so, they could say so.

Mr. FitzGerald: The only way they could do it would be from a long period of observation.

The Court: Let's treat this soldier boy absolutely fair here.

Mr. FitzGerald: We are trying to your Honor.

305 The Court: I doubt it very much.

Mr. FitzGerald: I am sorry, I am.

The Court: To say he's been found guilty of non-support, how is that admissible in this case? Supposing she thought he was capable, is that any reason that the jury should think he was capable? I may think this capable or incapable but that doesn't make evidence for or against him. It is what the facts are.

Mr. FitzGerald: It is something they
306 can have to consider.

The Court: No, it isn't evidence the fact is so. The wife may have got mad at him and wanted to put him in jail anyway, for anything she could get him in for. The question for us here is—we are going to try this case instead of resorting to outside things that have nothing to do with it,—what was this soldier boy's physical condition? Not what some wife has done to him. I cannot see how it is important

at all if he's been unfortunate enough to have been convicted of being intoxicated, unless alcohol is the cause of his present condition. 307

Mr. FitzGerald: There isn't any doctor can come in and say anything is the specific cause of his condition.

The Court: Isn't the real purpose of putting that in to inflame the human mind against this soldier boy?

Mr. FitzGerald: No, it isn't.

The Court: It looks to me as if it were. 308

Mr. FitzGerald: No, it is to affect his credibility.

The Court: You have your own way but I resent it.

Mr. FitzGerald: I apologize to the Court.

The Court: That doesn't help the soldier boy. He cannot live on an apology.

Mr. FitzGerald: If the suggestion has been prejudicial, it is within the right of the attorney for the plaintiff to move for a new trial and it will not be opposed at all. 309

The Court: This is the second trial. This is a new list of jurors. This boy wants the rights of his case.

Mr. FitzGerald: There can be another jury empaneled and it will not be opposed by the Government.

*N. W. Lumbra, re-called for Pltf., Re-direct.*

310 RE-DIRECT EXAMINATION by Mr. McNamara:

Q. Did that intoxication come about by reason of you and someone else ringing the church bell on a third of July night? A. The one before that, he is referring to,—on March meeting.

Q. Have you been given to the use of intoxicating liquor since you got out of the army? A. Have I what?

Q. Have you used intoxicating liquor to any extent? A. I would take a drink; not to any
311 extent.

Q. Ever drink to get drunk? A. Well, I have, Yes.

Q. Since the war? A. Not very often.

Q. During the time you were with the C. V. Railroad, you didn't drink, did you? A. No, sir.

Q. Since 1922 down to date you haven't had any intoxicating liquor? A. No, sir.

The Court: You didn't make it clear whether the ringing of the bell for Town
312 Meeting was before or after the war, did you?

Mr. McNamara: No, I didn't.

The Court: I would like to know whether it was before or after the war? No, I guess I won't. You take your own course.

Q. Was that before or after the war that that happened? A. After the war.

Q. The summer after you got back? A. Yes.

*M. Brissette, for Plf., Direct.*

MITCHELL BRISSETTE called as a witness by the plaintiff, being duly sworn, testified as follows: 313

Direct Examination by Mr. McNamara:

Q. Your name is Mitchell Brissette? A. Yes, Mitchell Brissette.

Q. You now live in St. Albans? A. Yes, sir.

Q. Lived there for how long? A. Since 1922.

Q. What is your business? A. I am car man for the Central Vermont Railroad. 314

Q. Prior to the war did you live in Montgomery? A. I lived there before the war,—at the time of the war. I lived there from the time I was born until I left in '22.

Q. Did you know Newton Lumbra there in Montgomery? A. Yes, sir, as long as I can remember.

Q. Did you work with him sometime before the war? A. Yes, sir, he worked for me in 1915 in the woods cutting logs.

Q. For how long a period was that? A. I 315 wouldn't dare say exactly because we didn't keep very good records; we didn't have any records or secretaries or one thing and another, but he worked, if I recollect right, practically that winter of '15.

Q. Just what was his work there? A. His work was handling an axe and a crosscut saw, cutting logs.

Q. How many hours a day did he put in? A. I would say anywheres from eight and a half,

316 nine to ten hours a day, depending on what luck we had cutting the logs. He was very steady for the reason we had a certain amount of men and if you break the team up you are out of luck.

Q. Do you know of him losing any time during that winter period? A. Not to my knowledge.

Q. What kind of a workman was he? A. He was a very good workman, very tough and rugged; he was as strong as a bear at that time.

Q. This was in the winter of '16? A. '15.

Q. Did you know him from then on until he
317 went in the army? A. Yes, and then he worked to the veneer mill. I worked a while there with him I believe in '16.

Q. Do you know what he was doing there? A. He was working on the vat, rolling blocks or logs into this vat.

Q. Is that heavy or light work? A. That is heavy work, I would consider it.

Q. Do you know how steady he was there? A. I wouldn't dare say to that fact.

Q. Did you know of his having any physical
318 disability at that time? A. No, I did not.

Q. Did you have anything more to do with him after that time until he went in the army? A. Not to my recollection.

Q. You saw him around? A. I saw him around, of course, working around.

Q. Any change in his appearance from the time he was in the woods that winter with you until he went in the army? A. No, he didn't act so to me anyway. He seemed to be lively.

Q. You were there when he came back from the war? A. Yes, sir.

Q. Did you see him around the time he came back? A. I wouldn't dare say just how soon but soon after he came back because I was living right there in Montgomery Center. 319

Q. Did you notice any change in him? A. Yes, I did.

Q. What was it? A. He acted slower of movement; in a way he acted like a man who had some shock or something; some serious operation. He moved around very slow and it was peculiar to me because he had always been very active up until the time he joined the army. 320

Q. Was this quite noticeable to you, so by looking at him you could see that change? A. You could see when he moved around, because he was very active before, and to see him that time he didn't act as though he was coming or going; just moping around.

Q. Did you know about his work there in Montgomery after the war? A. Of that I haven't a very good recollection. You see I didn't have any particular notion of following up his work or anything, and I think I would be safe in saying I wouldn't have anything to say on that until about '22. 321

Q. In 1922 you did become closely acquainted with him again? A. Yes, sir, I hired out in '22 to the Central Vermont Railroad.

Q. Did he hire at the same time? A. I think it was in July.

Q. What part were you in? A. I was in the car department; passenger and freight department.

*M. Brissette, for Plff., Direct.*

322 Q. And where was he? A. He was in the motive-power.

Q. Did you see him frequently? A. I see him at noon time or night, or something like that, or in the morning.

Q. Did you know how he was for steadiness there? A. Well, I would notice him out perhaps on the street at times and I might ask him how he felt or something? I really felt if he was loafing he had to have some excuse for not working. I wouldn't specify just exactly how

323 Q. Did you work with him in the same department for the C. V.? A. I believe it was around '24 or '5, if I recollect, he worked into the car department.

Q. With you? A. As a laborer; not with me; he was all around the department there.

Q. How did he do his work there? A. Well, he tried to do the best he could I suppose, and as the boys would see he couldn't do his work, if there was any little lift they could give him, they would. They had him on as a laborer, finally he
324 couldn't do the work was set out for him and they made him I would call him janitor, cleaning offices and lavatories and so on and so forth.

Q. Could he do the work the other men in the department were required to do? A. No, sir.

Q. You say he was helped by the other men? A. Yes, sir.

Q. Did he lose any time? A. Yes, sir.

Q. How much? That is, in your judgment?

Mr. FitzGerald: I object; the records will show.

The Court: He can tell if he knows, much or little. 325

A. To that question I wouldn't dare say. I know he lost quite considerable time but I wouldn't dare say. I know he would have these spells and when he come back to work he acted to me like a man who come out of a long illness and was trying to get back to work; that is the way it seemed to me.

Q. Each time he would be off for a day or two and come back, would he have that same appearance again? A. Yes, he would. 326

Q. Of course, you knew he was an ex-service man? A. Yes, sir.

Q. Do you know if the other men in the department knew that? A. I wouldn't dare answer that question. Without a doubt they did.

The Court: Why wouldn't you dare answer it?

Witness: I personally wouldn't know. I figured they did know but I wouldn't say for sure. I wouldn't want to commit myself to that effect. 327

Q. You did know he was receiving some special consideration? A. Yes, sir, to my knowledge if you work for the Central Vermont Railroad, not that it is a hard railroad to work for, but when you are losing all this time, someone has got to know the reason that you are loafing,—I do know that,—and I considered they must know he was an ex-service man or something why he was losing this time, in order to hold his job.

Q. And that they were excusing him for some such reason? A. Yes, sir.

328 CROSS EXAMINATION by Mr. FitzGerald:

Q. You don't know anything about Mr. Lumbra from the time he was discharged until '22, is that correct? A. Not much; I saw him in 1919.

Q. You don't know whether he was working,—you are not able to testify on that point, from '19 to '22? A. I practically cut that out.

Q. You say you saw him in '22 when he went to work for the Central Vermont and then you resumed your friendship? A. Yes, sir.

Q. And you saw him on the street at times?

329 A. At different times.

Q. During the day or night? A. I would see him if he was working, through the day.

Q. These times on the street? A. I wouldn't specify; it might be through the day or at night; he might be getting over these spells and be walking around the street.

Q. Then if it was during the day, you wouldn't be working either? A. That would be after four o'clock.

Q. You testified he lost time, Mr.—what years,

330 did he lose the most time, do you know? A. Well, I know in our department, if I recollect right, he worked there from around '24 —'26, or something to that effect.

Q. From 1924 to 1926, and how much time would you say he lost there? A. I wouldn't dare say that. He lost considerable. I would say on an average perhaps he didn't work over—well, I will set it around three or four days a week.

Q. He lost about half time? A. I should figure that.

MRS. FLORENCE LUMBRA, called as a wit- 331
ness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. You are the wife of Newton Lumbra? A. Yes, sir.

Q. When were you married? A. I was married in 1922, December first.

Q. And have you lived with your husband since then? A. Yes, sir. 332

Q. Where do you live? A. In St. Albans.

Q. How many children have you? A. I have two, a girl and a boy.

Q. Did you know anything about your husband's physical condition at the time you married him? A. Just what he told me.

Q. How long had you been married to your husband before you discovered something about his physical condition? A. About four months.

Q. And that would be the early part of 1923? A. '23. 333

Q. What happened the early part of 1923? A. He had a fit.

Q. What time of day? A. Four o'clock in the morning.

Q. Tell the jury how he acted, what happened and all about it? A. I heard him groan and he fell to the floor.

Q. And where was he when you found him? A. On the floor; between the kitchen and the dining room on the floor.

334 Q. How long was he unconscious this time? A. About ten to fifteen minutes.

Q. Did he go to work that day? A. No, sir.

Q. How long after that was it before he went to work? A. Quite a few days after.

Q. Now, between the date of your marriage and 1923, the early part of 1923, what was his conduct? A. It was good.

Q. How did he act? A. He act? He used to come home from four until six and would lie down and rest until supper was ready.

335 Q. Did he appear tired out when he come home? A. Yes, he appeared tired out when he come home.

Q. Who was he working for at that time? A. The Central Vermont Railroad.

Q. From that time on, did he continue to have these "fits" as you term them? A. Yes, sir.

Q. And did they become more or less frequent? A. More; he had them more often and harder.

Q. How many would you say he was having a
336 month? A. He had two to five a month.

Q. Did he continue to have these during the years '24 and '5? A. Yes.

Q. And he was still working at the Central Vermont? A. Yes, sir.

Q. How much time would you say he was losing? A. Quite a little time.

Q. Did you know of his having these spells anywhere other than to home? A. No, sir, I did not.

Q. Did there come a time when you were

obliged to ask for help from someone? A. Yes, 337
sir.

Q. Whom did you ask? A. The American Legion.

Q. Did you receive any help from them? A. Yes, sir.

Q. When was that? A. In 1926.

Q. Was he working at this time? A. Yes, sir.

Q. What did the American Legion do for you at that time? A. They sent my husband to the hospital. 338

Q. And what did they do for you? A. They give me wood, coal, groceries and rent.

Q. Do you know what hospital he went to? A. Yes, sir, the Chelsea Naval Hospital, and Washington.

Q. Did you at any time go with him? A. Yes, sir.

Q. How many times? A. I went with him three times as his attendant.

Q. Who sent you? A. The Veterans Bureau and the Government paid my expense. 339

Q. How long did he stay at the hospital the first time he went? A. A month.

Q. And how many times has he been since then? A. He has not been since 1930.

Q. He hasn't been since 1930? A. 1930 was the last time he went, and I went with him.

Q. How long did he stay that time? A. He was gone six weeks.

Q. Who was attending your husband during this period of time, if you know? A. From 1926?

Q. Yes. A. Dr. Herman.

340 Q. Did you at any time call Dr. Hernian when he was having these seizures? A. Yes, he saw him in one; the first one was 1926.

Q. You hadn't called him any time before this? A. No, sir, couldn't afford one.

Q. Did your husband always come out of these seizures? A Yes, sir, I always stayed right with him.

Q. Has he ever been injured in one of them? A. Yes, sir.

Q. When was that? A. That was in 1929.

311 Q. What happened that time? A. He went up street and come home, and he had a fit,—I was getting dinner,—and he come home—I was frying my meat for dinner and the first thing I knew he fell behind me. He went in the woodshed to get some wood and he fell down and had black eyes. He fell down,—had a fit,—and I went out to help him.

Q. Now, did there come a time when your husband lost his job? A. Yes, sir, 1929, February 28, 1929, he got fired.

342 Q. And do you know the reason he was fired? A. Yes, sir, because he had epileptic fits.

Q. What happened that morning, if anything, before he went to work? A. From six o'clock in the morning until seven he had six fits, one right after another. Eight o'clock he went to work, and nine he was brought home.

Q. Who brought him home? A. Two men by the name of Garrett and Mitchell.

Q. After he was brought home, what did you do? A. I helped him undress and put him to bed and went to see Mr. Noell and the nurse.

Q. Did you have some talk with the nurse? A. Yes, sir. 343

Q. And as a result of that conversation which you had with the nurse, did you learn what happened? A. I learned my husband had epileptic fits.

Q. And did you see someone else that morning? A. Yes, sir, I saw Mr. Noell.

Q. What was the purpose of your going to see Mr. Noell? A. To see if he could get his job back, and he said he couldn't keep him on account of it being a liability having a man with fits. 344

Q. Did he take him back? A. No, sir.

Q. Has your husband been working anywhere since then? A. No, sir; not for three years; going on four years.

Q. Do you know of his attempting to get employment? A. Yes, sir.

Q. Where? A. To the City Manager.

Q. Anywhere else? A. All over.

Q. Has Newton had any of these seizures recently? A. Yes, sir.

Q. When was the last time? A. Friday noon; 345 last Friday noon.

Q. How many did he have? A. He had fifteen inside of ten days.

Q. And the last one was Friday? A. The last one was Friday.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Did you know anything concerning Mr. Lumbra from 1919 to 1921? A. I met him in 1921.

346 Q. You didn't know anything about him before that? A. No, sir, I am his second wife.

Q. When did he have his first seizure? A. In 1923; the early part of 1923.

Q. From the time you knew him in 1921 until this time in '23, did he have any other similar attack to your knowledge? A. Not as I remember.

Mr. FitzGerald: That is all.

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347

JOHN R. DODGE, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. Your name is John R. Dodge? A. Yes, sir.

Q. You reside where? A. Montgomery Center.

Q. How long have you lived there? A. Why,
348 right in the Center, thirty years,—thirty-two years.

Q. Do you know Newton Lumbra? A. I do.

Q. Do you hold some town office there now, Mr. Dodge? A. I am Overseer of the Poor, Constable and Deputy Sheriff.

Q. Now you say you do know Newton Lumbra? A. Yes, sir.

Q. How long have you known him? A. Why ever since he was big enough to walk.

Q. You knew him before he enlisted in the army? A. Yes, sir.

Q. Now what kind of a boy was he, Mr. Dodge? 349
A. He was a good, tough, rugged, active boy.

Q. Vigorous and active? A. Yes, sir.

Q. Did you know anything about his employment before he enlisted in the army? A. Well, I know when he was young, while his father lived, he had to work hard and I guess after his father died he tried to. He had to stay home with his mother on the farm at first and work I guess.

Q. Did you see him after his return from the army? A. Yes, I saw all the boys a few days after their return. 350

Q. Did you notice any material change in him after he had returned? A. I noticed along later that he didn't act as he did before; that is, he wasn't so vigorous and didn't seem to be as—I don't know whether you call it "bright"—but he wasn't as active as he was before.

Q. He appeared to be dull? A. Yes,—dull.

Q. Did he have a reputation about Montgomery of being a good, steady, conscientious boy?

The Court: That isn't admissible.

Q. Waived. 351

Q. Was it noticeable to you, Mr. Dodge, that there had been a marked change in his appearance after he returned? A. I think there was. I would see him,—of course I was truckman there at that time,—trucking through the village I would see him around his mother's, and I noticed he wasn't working much.

Q. Had you noticed him around the village before he enlisted as much as he was after he returned? A. No, before he enlisted I think he

352 worked and tended to business as well as the average.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Did you know him intimately before the war, Mr. Dodge? A. Yes, sir.

Q. And after his father died, you guess he worked? A. He worked in this way—of course he stayed with his mother,—she was on a little farm there, and he tended to things and was there I guess.

353 Q. Did you know anything about his employment in the woods as a chopper? A. No, I don't know anything about his employment in the woods.

Q. Did you know anything about his work in the mill? A. I knew he worked in the mill.

Q. Before or after the war? A. Before the war.

Q. Did you know about his working after the war? A. I knew he didn't work a terrible lot. This was hearsay some, and then he hung around.

354 Q. What you know yourself. A. I know he was around home a good deal and was around the streets after the war.

Q. You don't know whether he worked in the mill after the war? A. I know he tried to, but—yes, I saw him in there working.

Q. Do you know whether or not his employment was any more regular after the war in that mill than it had been before? A. I don't think it was as regular. I don't think he worked as before, because he was hanging around the Center.

I was through the Center from one to fifteen times a day, right by his house. 355

Q. Isn't it true you had more opportunity to see him in the Center after the war because they had moved into the village where they had been outside before? A. Not really, because I was working on the road and by his house and so on and so forth. I have always been more or less acquainted with him and saw him.

Q. Isn't it true he was in the village more after the war than before for that reason? A. Sure he was in the village more after the war than before. 356

Q Because he lived there after the war? A. Sure.

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DR. FRANK B. HUNT, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara: 357

Q. Give us your full name Doctor? A. Frank B. Hunt.

Q. You are now a practicing physician in Fairfax? A. Yes.

Q. State your medical training? A. University of Vermont.

Q. And finished there when? A. 1913.

Q. You have practiced medicine in Vermont since then? A. Yes.

Q. Did you practice in Montgomery at some time? A. Yes, sir.

358 Q. When were you there? A. I went there in January, 1918, and stayed until 1922, May I think.

Q. Do you keep office records of your patients who call on you? A. Not treatment records.

Q. What kind of records do you keep? A. Just charges.

Q. Did you have any record in your file of Newton Lumbra? A. I haven't any, on treatment.

Q. Do you recall treating him in 1919 and
359 '20? A. I recall him coming into my office. I couldn't say what I treated him for.

Q. At the last trial you were shown a statement you made to the Government back in '20 or '21,—do you recall that? A. Yes.

Q. Did that help you then recall for what you had treated him? A. Yes.

Q. What was it you treated him for? A. I don't recall.

Mr. McNamara: Will you give that paper, please? (Mr. FitzGerald looks
360 through his files.) I can ask a question and clear this up, if they cannot find the form.

The Court: That can be found, of course, or has it vanished?

Mr. McNamara: It was admitted as an exhibit in the other trial.

(Dr. Hunt excused at this time.)

JOHN S. CARROLL, called as a witness by 361
the plaintiff being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. You reside where? A. St. Albans.

Q. How long have you lived there? A. Forty-five years.

Q. What is your business there, Mr. Carroll? A. General Foreman of the Motor Power Shop.

Q. Do you know Newton Lumbra? A. Yes. 362

Q. At some time did he work under you? A. At first he worked under me in 1922, in New London.

Q. Did he later work under you at St. Albans? A. Yes, he did in 19—(looks at paper) 1926, as a watchman.

Q. How long, in all, was he under you, Mr. Carroll? A. From 1926 until 1929.

Q. I want you to describe to the jury what he attempted to do while working under you and how he did it, and describe his general appear- 363
ance and all about it; what assistance was given him, if any? A. In 1926 he was transferred to the motor power shop as a watchman and he was off a good deal of the time on account of his health, and as this job required a man all the time, watching, we had to reduce him as a laborer, and being as a laborer he lost a lot of time. In 1929 he had a bad spell and he was sent to our railroad Doctor and his condition was such that we couldn't employ him longer.

364 Q. Now can you tell us more about how he did his work while he was under you? A. He appeared to be very logy and acted as though, at times after he loafed, as if he had been through illness had been sick, didn't seem to have any ambition.

Q. Was he favored more or less by you and his fellow employees? A. Yes, he was.

Q. Tell us about that? A. Well on account of being an ex-service man and not feeling good, he had had several leaves of absence and we ex-
365 pected his health would be restored to him which wasn't.

Q. Why was he favored over other men? A. On account of being an ex-service man.

Q. Was he able at any time to compete with the other men in that same line of work during the time he was under you? A. No.

Q. Why was he allowed to keep his job as long as he did there? A. Well he was a healthy looking boy, and as I said, he had been on several leaves of absence,—been in the hospitals,—and
366 we expected that his health would be restored to him.

Q. Had other men been losing as much time as he was, would you have kept them? A. No.

Q. Whether or not it was an inconvenience to you? A. I wouldn't no.

Q. Having a man losing so much time? A. No, we couldn't.

CROSS EXAMINATION by Mr. FitzGerald:

Q. You first saw him in '22? A. Yes.

Q. And how long a period did he work for you

at that time? A. In '22 he worked in New 367
London not over three or four weeks.

Q. Just a short time? A. Just a short time.

Q. Do you recall whether or not his work was steady during that period? A. It was not.

Q. And the next time you saw him was in 1926? A. '26.

Q. Do you recall the month he came under your supervision in '26? A. December.

Q. December 1926? A. Yes, sir.

Q. And how long did he stay under your supervision? A. Until 1929. 368

Q. What month? A. March.

Q. During the period from December '26 to March of '29, do you know whether or not his work was regular or otherwise? A. It was not regular.

Q. How about the first month he was on the job, December? A. He lost time.

Q. Much time, sir? A. I couldn't say; probably a couple days a week, or three.

Q. That is about typical of his full period of employment for you, just worked about half the 369
time? A. Just about half the time.

Q. How about his time during '27 and '8, that was just the same, was it? A. Yes.

Q. What was the nature of his duties at that time? A. '27 and '8 as a laborer.

Q. And his work was just about as irregular then as it had been during the first month? A. Yes.

Mr. FitzGerald: That is all.

(Recess.)

*Dr. F. B. Hunt, re called for Plff., Direct.*

370 DR. FRANK B. HUNT, re called:

Direct Examination by Mr. McNamara (continued):

Q. Doctor, I show you a paper marked Plaintiff's 4, April 19, 1932, KAG, and ask you if that is your signature? A. Yes, sir.

Q. What is that paper? A. Why it's an affidavit a statement To Whom It Concerns that I treated Mr. Newton Lambra since June
371 1920 and I found he suffered from rheumatism, chronic bronchitis and nervousness, and this condition incapacitated Mr. Lambra to a certain extent from doing his daily tasks.

Q. State what you believe the cause? A. I believe these disabilities were brought on by exposure to shell shock, poison gas and inclement weather during his war services.

Q. That was signed by you and sent to the Veterans Bureau? A. I don't recall sending it but that is my signature.

372 Q. That is dated Dec. 7, 1920? A. Yes, sir.

Q. And is that all your handwriting? A. Yes, sir.

Q. And it is your signature on it? A. Yes, sir.

Q. Having seen that, what do you say, did you treat him for rheumatism, chronic bronchitis and nervousness? A. I must have.

Q. And was it your judgment that those conditions incapacitated him from doing daily work? A. I must have—I signed my name to it.

*Dr. F. B. Hunt, re-called for Plf., Cross.*

Q. And did you then believe these disabilities 373
were brought on by shell shock, exposure to poison gas and inclement weather? A. I must have I signed my name to it.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Do you have any personal recollection of this man? A. I recall his coming into the office occasionally. I couldn't recall treating him. I don't recall signing that paper.

Q. Were you in the service, Doctor? A. No, sir.

Q. Did you have any experience with shell 374
shocked men? A. No, sir.

Q. Did you have any experience with any persons who were gassed over seas? A. No, sir, not to my knowledge.

Q. You stated that it incapacitated him to a certain extent. Did you mean it totally incapacitated him? A. Well, as I remember him he was not able to work regularly. I didn't know the man before the war. I knew him only after.

Q. How frequently did he call on you from 375
June to December 1920? A. I couldn't say. I should say perhaps once a month or once in two months.

Q. And did he ever complain to you of having epileptic seizures of any kind? A. No, sir.

Q. Now Doctor, this rheumatism he complained of at that time, how did it affect him? What kind was it? A. Well, I don't recall treating him. I don't even recall his rheumatism, whether muscular or arthritis.

*Dr. E. B. Hunt, re-called for Pltf., Re-direct. Discussion.*

376 Q. You k recall he was not totally incapacitated? A. Yes, sir.

RE DIRECT EXAMINATION by Mr. McNamara:

Q. When you say he was not totally incapacitated, you mean from a medical standpoint? His disability did not completely incapacitate him from a medical standpoint?

377 The Court: Why did you sit silent and let that evidence go in? It is for the jury to say what total incapacity is.

Mr. McNamara: I wanted to have the Doctor explain just what he means by

The Court: You should have objected to the testimony any how. What do we care about it?

Mr. McNamara: The Doctor previously stated the incapacity was such he couldn't work steadily.

378 The Court: That is all right. We won't take our definition of what total incapacity is from the Doctor. We will take that from the law of the land.

Mr. McNamara: I want to show from the Doctor in view of the Court's ruling of what total incapacity is within the purview of this contract, if he was not able to work steadily he was totally incapacitated.

The Court: We know what the Court says total incapacity is and we won't linger

her to find out what some doctor thinks about it. The Supreme Court of the land has told us that and Congress has told us that. 379

Mr. McNamara: That is all.

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ALFRED A. SOULIERE, called as a witness by the plaintiff, being duly sworn, testified as follows:

380

Direct Examination by Mr. Sylvester:

Q. Where do you reside? A. St. Albans, Vermont.

Q. How long have you lived there? A. About fifteen years.

Q. You hold some position with the Central Vermont Railroad? A. General foreman of the Car Department.

Q. How long have you held that position? A. About five years. 381

Q. Previous to that did you work for them? A. I have worked—held every position in that department prior to that from cabinet maker to gang foreman, departmental foreman, assistant general foreman and now I am general foreman.

Q. Did you at one time hold some city office too? A. I was Alderman three years and Overseer of the Poor one year.

Q. Do you know Newton Lumbra? A. Yes, sir.

382 Q. How long have you known him? A. Since the early part of 1924.

Q. Did he at some time work under you? A. He did from 1924 until 1926.

Q. In what department was that? A. That was in the car department.

Q. Describe to the jury, Mr. Souliere, the manner in which he did his work, his general appearance and how he conducted himself and what assistance was given him by yourself and fellow employees, if any. A. He began to work in the
383 early part of '24, I think it was February, and he worked there, if I remember right, as a laborer and helper—from helper back to laborer,—laborer to janitor, which is about the same thing only janitor is much lighter work, and the purpose of that was he was not working very long when we found out there was something the matter with him; that he was a willing worker,—he was trying to do what he could to do the work but somehow he just couldn't make it go, and it has been my experience that he come in the morning and
384 go to work when everything looked as though he would go along with his work but maybe in the forenoon or the afternoon he would ask permission to go home, and he would be sick and look all in. I think it was in 1926 he was given a leave of absence to go to the hospital, and I personally did all I could to help him out by changing him from one job to another for the simple reason that the fellow was willing and apparently he was sick, and being an ex-soldier—we have favored ex-soldiers and we still have two we favor the

same way today in my department. That is the 385
reason we have tried him every place and finally when we couldn't make it go, in talking to my superior, Mr. Noell, we thought we would try him in the other department as watchman. We didn't have no opening in that line, and he was transferred under Mr. Carroll who testified before me; that was in 1926, December I believe.

Q. These transfers that were made were from heavy to light work? A. It was lighter work.

Q. Each time? A. It was lighter work,— 386
lighter and lighter work all the time.

Q. Describe a little more in detail as to his appearance on the job,—how he conducted himself? A. Why he—his face appeared to be haggard like; tired and haggard;—he would come in the morning—he would appear to be all right, and he may come along a couple days and not be too bad, and then he would be sick and ask to be off. I don't know whether he had any fits while under my supervision. If he did have them it wasn't called to my attention. Whether he 387
would—if I had known he had any fits I would have dismissed him from service or reported him to the superior officer on account of the liability to the railroad.

Q. Why would you have dismissed him? A. On account of the liability to the railroad, on account of a man working on a staging, or on the floor and fall on the cement,—the railroad is liable.

Q. Could you tell by your observation of him

388 whether there's apparently something wrong with him? A. There's no doubt in my mind but what there was something wrong with him.

Q. You say you didn't know of his having one of these seizures while working under you? A. No, I didn't know.

Q. Was he working steadily? A. He was losing a lot of time.

Q. By reason of that fact, did you report to someone he was losing a lot of time? A. I did take it up with my superior, Mr. Nboll he was
389 losing, I should say by memory I would call it twenty five or thirty per cent of the time; maybe more.

Q. What was done, if anything, after you took it up with your superintendent? A. He was tried in the other department.

Q. Was he able at any time to compete with the other men in that same line of employment while under you? A. I didn't think so at the time.

390 CROSS EXAMINATION by Mr. Fitzgerald:

Q. Your first knowledge of Mr. Lamburn was in 1924? A. Yes, sir.

Q. You didn't know anything of him prior to that? A. No, sir.

Q. He worked for you from February 1924 to December 1926? A. Yes, sir.

Q. During that period, Mr. Soulière, was his attendance regular or otherwise? A. It was not regular; he was losing a lot of time.

Q. About how much time was he losing? A.

Why I haven't figured it out. I could if I looked 391
my records up, but it would be twenty five or thirty per cent of the time probably, we will call it that.

Q. When he went home, you testified he come in some days apparently feeling well and then going home during the day sometime? A. Yes, sir.

Q. Did he punch out when he did that? A. Oh, yes.

Q. How about his pay, did he ever get a raise or not? A. Why, he I wouldn't remem 392
that, but if what you might call it, if he got a raise, it was what you might call a blanket raise; if by agreements everybody got one or two cents more an hour, he would benefit with the others.

Q. As far as you know, he never got a raise of five cents an hour. Just these blanket raises as you testified? A. Yes, that is all.

393

H. G. NOELL, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. Your name? A. H. G. Noell.

Q. You are a resident of St. Albans? A. I am.

Q. Tell us just what your business is? A. Mechanical Superintendent of the Central Vermont.

394 Q. As such just what do you have charge of? A. I have charge of the maintenance of loco motives and cars on the system, mechanics who work on this equipment, and the engineers and firemen.

Q. And do the shops come under your supervision? A. They do.

Q. How long have you been in that position? A. Since May 1st, 1919.

Q. Did you know about the employment of Newton Lambra with the railroad? A. Yes.

395 Q. And when did his employment start there? A. In July 1922.

Q. Do you know how it happened he was taken on at that time? A. Well, prior to on July 1st, 1922 the shopmen throughout the country, that is the railroad shopmen throughout the country went on strike, so the Central Vermont men went out too, so at that time we hired practically a new force of men and Mr. Lambra was one of this number.

396 Q. Did you personally have anything to do with hiring him? A. No, I didn't hire him personally.

Q. Did he came to your attention sometime shortly after he went on the force? A. Well he was hired probably by one of the general foremen and he didn't come there wasn't anything about his case that came to my attention for a little while. He was shortly after he was hired he was transferred to New London, Connecticut. It is my recollection that he either didn't like it there or perhaps didn't fill the bill, and he was

transferred back to St. Albans. From then on 397
or shortly after that he was tried out a number of
different jobs as a mechanic's helper, and there
was some complaints about his work, so finally
he was put on laboring work.

Q. Will you go ahead and tell us just what his
experience there was with the concern, about
the various transfers and why they were made?
A. Well at the time he was hired it was at a
machinist helper's rate; that is, his work con-
sisted of helping a machinist; he was later trans-
ferred to a boiler maker helper and I think back 398
again to a machinist helper. That took him up
to some time in 1923 I think. Then he was em-
ployed or set back to a laborer; at that time to a
laborer in the freight car shops. He came under
Mr. Souliere who is the general foreman there.

Q. Do you know if these changes were made
because of the way he was doing his work? A.
Primarily, yes. Ordinarily a man would go up
in the scale, rather than reduce in the scale.

Q. These changes were all reductions? A.
Not all of them; he was transferred from one 399
helper's job to another in the first year or so,
trying to find some work he would fit in on.

Q. You knew at that time they were having
this trouble in placing him? A. Yes.

Q. After he got to Mr. Souliere's department,
how did he get along there? A. He was tried
on a number of different classes of work there;
laboring work,—then we had a vacancy in the
locomotive department as a watchman, so he was
then transferred to that department and came un-
der Mr. Carroll as general foreman there.

400 Q. While in Mr. Souliere's department was the office of janitor created there? A. I am not sure the office was created but we have that type of work—it is my recollection he was given that work.

Q. Is that lighter or heavier than the work of the other men in the department? A. That would be the lightest work we would have around the railroad shop.

Q. While he was doing that, he was then transferred over to Mr. Carroll's department as night
401 watchman? A. Yes. That, the watchman's job would be in about the same category as to the lightness of the work.

Q. How long did he stay on the watchman's job, if you know? A. Only a very short time, from December 8, 1926 to January 12, 1927.

Q. Do you know why he was taken off that work? A. I think he was taken off the work because of his irregularity. It is my recollection it was a night watchman's job and from the fact he loafed frequently and always made an inconvience
402 trying to get someone else in the night to fill his place,—so we took him off.

Q. Do you know what he was put on to at that time? A. I think he went back to ordinary laboring work,—sweeping the floor and cleaning up and so forth.

Q. During this period you personally came to know him, did you? A. Oh, yes.

Q. Was there something wrong with him that you could notice? A. Well you see I had reports from the departmental foremen, about his

being unable to do the work first; that is how it 403
first came to my attention, and I think I called him in the office to try to find out what was the matter. Then from then on he came in probably a half a dozen times in the remainder of the time that he worked for us, either to see me about a leave of absence because of his physical condition, or to tell me he was going to the hospital for treatment. It was perfectly apparent from the first time I saw him or called him into the office that he was not well.

Q. He was not well, you say? A. He was not 404
well.

Q. And did that condition—did that appearance continue all during the time he worked there? A. Yes, he never showed any improvement. He didn't look very badly at the time, but as you talked with him and you watched his actions around the shop, as we of course saw him around there, it was perfectly apparent that the young man was not able to work.

Q. Was he able to do any of the work that any 405
of the men in any of these departments are supposed to do,—reasonable able to carry it on? A. I don't think so.

Q. You knew about his being dismissed from the employment of the road? A. Oh, yes.

Q. And you knew why? A. Yes.

Q. Why was that? A. Well it was brought to my attention that he had an epileptic seizure in the shop, and so I felt that he should be sent to our company physician to make an examination which was done, and the company physician re-

406 commended that he not be continued in employment.

Q. Who was the company physician? A. Dr. Allen Davidson.

Q. And as a result of his recommendation, the man was dispensed with? A. Yes.

Q. Now have you at my request made a record showing the percentage of time this man was off during his employment with the railroad? A. Yes.

Q. Will you tell us what you find that to be?

407 A. Well, we have checked the clock rolls to ascertain just how much time he lost during the period he worked for us from July 12, 1922, to March 4, 1929. The first two months of '22, that is July and August, he worked every day. The month of September he lost 10 days, which is equivalent to 38 per cent of the time lost. October he lost 11½ per cent. November he lost 30 per cent. December he lost 30 per cent. January of 1923 he lost 8 per cent. February, 20 per cent. March, 38 per cent. April, 11½ per cent,

408 and then in the first 16 days of May he lost 4 days, which was 15 per cent. At that time there was a reduction in the number of employees in the railroad and he was laid off, from then until February 18, 1924, so that for the latter part of February he lost no time; that is, in that last week in February. March he lost 9 per cent. April, 8 per cent. May he lost 5 per cent, but he resigned in May to go to work for the Boston and Maine Railroad. He then came back and asked for employment again in December of 1925; re-

turned to work December 12 and he worked all 409
of that month and the month of January. Feb-
ruary he lost 1/8 of a day. That is wrong. Feb-
ruary he lost 9 days, which is equivalent to 35
per cent. March he lost 4 per cent. April, 13
per cent. May, 6 per cent. June, 1½ per cent.
July, 16½ per cent. August, I am sorry, that
is all wrong. I cannot follow my lines across
very well. February was 1/8 of a day out. He
worked all of February. He returned to work
on December the 12th and he worked the last of
December, and he worked all of January; he 410
worked all of February with the exception he was
out 1/8 of a day. March he lost 35 per cent.
April, 4 per cent. May, 13 per cent. June, 6
per cent. July, 1½ per cent. August, 16½ per
cent. September, 17 per cent. October, 2 per
cent. November he worked continuously. De-
cember, 6 per cent. 1926, January, he lost 4 per
cent. February he worked continuously. March
he lost 8 per cent. April, 17 per cent. May he
worked continuously. June, 5 per cent. July,
5 per cent. August 23 he was granted a six 411
months leave of absence, but up to that time he
had lost 8 per cent. He returned from his leave
of absence in September, on September 27 but he
was not able to work. He was still on leave of
absence but he had taken this leave of absence
to go to the hospital. November he had returned
to work and he lost 2 days, which was 8 per cent.
December he worked continuously. 1927, Janu-
ary he lost 2 days which is 8 per cent. February,
8 per cent. March, 4 per cent. April, 12 per

112 cent. May, 4 per cent. June, 26 per cent. He was then granted another leave of absence to go to the hospital and he was out from June to September, inclusive. October he had by then returned to work, and he lost 12 per cent of the remainder of the month. November 28 he was granted another two month leave of absence to go to the hospital, and up to that time he had been absent 38 per cent of the time. He returned January 30th. February he worked continuously. March he lost 8 per cent. April, 16 per cent.
113 May, 38 per cent. June, 100 per cent. He was out the entire month. July he lost 13 per cent. August, 30 per cent. September he worked continuously. October he lost 8 per cent. November, 4 per cent. December, 8 per cent. 1929, January he lost 18 per cent. February, 10 per cent. March, 25 per cent, and on March 4, 1929 he left the service.

Q. Now Mr. Noell, was it usual or customary for your concern to keep a man employed who lost time as this man did? A. No.

114 Q. And was it usual when a man was on a job, if he couldn't do the work that he would be put on something lighter and transferred around the way this man was? A. We often times do that. We hire a man in good faith and if we think a man is willing and wants to get along, we try to find some work that is suitable for them, but I am frank to admit that we don't often change them as often as we changed Mr. Lambra.

Q. There was some reason then the road had for keeping him on in spite of the fact he had to

be changed in this way, was there? A. We kept him on because his case was unsettled. He was an overseas veteran and we felt that he needed all the help we could give him. 115

Q. And you tried to do it? A. Oh, yes.

CROSS EXAMINATION by Mr. Fitzgerald

Q. Was there an application filed by Mr. Lambros when he applied for work? A. Yes.

Q. Have you that with you? A. I haven't it with me. I think it is here as part of the record.

Q. Do you know who has it? A. I don't know. It was my understanding that you had asked for all of our office records, and as far as I know. 116

Q. I did. I was trying to ask you if you had it with you? A. No, I haven't it with me.

By the Court:

Q. Have you sent it to the Government? A. I understood you had asked for them through Mr. Berryman and I saw him in my office last night taking out some records, and from what he took out, I think he must have everything. 117

By Mr. Fitzgerald:

Q. He was first hired as a machinist's helper? A. Yes, that is right.

Q. What are the duties of a machinist's helper, Mr. Noell? A. Well his duties usually cover what the title signify, that is, he helps the machinist. A machinist would do many different kinds of work, and it would all depend on what machinist he was assigned to, just what his duties would be; it would be a hard thing to explain.

418 Q. Would it necessarily involve very heavy work? A. It might.

Q. And it might also be light? A. Not usually. A machinist that requires a helper—it is because of the heavy work, you see.

Q. How long was he kept as a machinist's helper? A. Well he was kept about two weeks until July 27. He was then assigned to boiler maker's helper.

Q. He worked from July 12 to July 27, 1922, and then he went in as a boiler maker's helper? A.
419 As a boiler maker's helper down to New London Connecticut.

Q. When he returned to St. Albans, in what capacity did he serve? A. As a boiler maker's helper from then until May 16, 1923.

Q. And he returned when, the middle of September? A. From New London you mean?

Q. Yes. A. He returned from New London August 17; he was there about two weeks.

Q. Which is the heavier work, machinist's helper or boiler maker's helper, or are they about
420 the same thing? A. They would be about the same.

Q. How about his employment in September and October 1926?

The Court: Do you expect to change this any? The witness has been all over this every month.

Q. I wanted to make sure when he came back? A. According to my record he returned from a six months leave of absence which was given him on August 23,—it is apparent he didn't stay out

the six months,—he returned on September 27, 421
which would be four days over a month.

Q. He returned in September and then worked— A. September 27, 1926.

Q. Do you know anything about what he was paid as remuneration? A. I have no record of it except we have all the payroll records.

Q. They're also coming down with Mr. Berryman? A. I understand so.

Q. He resigned a number of occasions voluntarily, did he? A. He resigned once.

Q. When was that? A. That was on May 12, 422
1924.

Q. And any other time that he left the service, it was just on leave, is that right, until the final termination? A. He resigned once, laid off once and granted three different leaves of absence.

Q. Now when you have a lay-off as occurred in this case, then did you recall the men or if they come back in your employment do they have to reapply for a position? A. Well at that time—I am not quite sure, but at that time I think if a man was laid off, he was put on to what we 423
would call "put on call," and he would be called back as required. The rules are a little different in that respect now.

Q. Mr. Noell, was Mr. Lumbra's work fairly satisfactory from the earlier days of his employment? A. Do you mean were they—were his services satisfactory when he was first employed?

Q. Yes. A. Well I don't think I can answer that question.

Q. You don't recall that? A. I might ex-

424 plain it by saying it was because of so many new employees at that time, it would be some time before you could say a man was not doing what we called standard work.

Q. This janitor work that he did there, is that a regular position there? Is there someone there doing that work all the time? A. Oh, yes.

Q. This schedule of work you read, Mr. Noell, for 1926, how did that compare with the attendance of the other men there?

The Court: We won't concern ourselves about the other men.

425 Mr. Fitzgerald: I think it is pertinent to show that his work was like he testified other men could not lose the same amount of time.

Q. Does the sheet you have there take in all working days, or does it also take in days the plant was not working? A. The sheet we have takes in only the days the plant was operating; that is, the days he would be offered work.

Mr. Fitzgerald: That is all.

426

FREMONT LUMBRA, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. Your name is Fremont Lumbra? A. Fremont Lumbra.

Q. And you are a brother of Newton Lumbra? A. I am.

*E. Lambda, for Plff., Direct.*

Q. And where do you live now? A. Berk- 127
shire, East Berkshire.

Q. Did you live in Montgomery? A. I did.

Q. When? A. Up until about nine years ago.

Q. You lived around Montgomery up to the time Newton went away to the war? A. Yes.

Q. And you were there when he came back from the war? A. Yes.

Q. Did you work with him some before he went away to the army? A. Yes; I did.

Q. Where was that? A. In the woods.

Q. And what year? A. Why I think it was 128
1914 '15.

Q. What were you doing in there? A. Lumbering; cutting logs.

Q. Was that the place where this road was built in? A. Yes.

Q. And the lumbering done there that winter? A. Yes.

Q. How long were you there on that job? A. I started in there the early part of the summer, and I was there all winter.

Q. Was Newton there during all that time? A. 129
Yes.

Q. Was he there all the time you were there? A. Yes.

Q. What were his duties? A. Cutting logs; sawing; cross cut saw, and chopping.

Q. What kind of a workman was he? A. He was a good workman.

Q. Lose any time? A. No.

Q. Did he have to have any help to do what he was supposed to do there? A. No.

430 Q. Or was he good and capable? A. Oh, yes.

Q. Did you know about his other work before he went in the army, other types of work and other jobs he held? A. Well I, yes, I know of other jobs he did; that is, worked different jobs.

Q. What kind of a workman was he, steady or unsteady? A. Yes, he was a steady workman.

Q. Lose much time? A. No.

Q. Have any illness that you know of? A. No.

Q. Any physical disability? A. No.

431 Q. How was he for activity? How he got around, describe how he appeared? A. He was a good active man, a good spry man and worked.

Q. You saw him, of course, about the time he went in the army? A. Yes.

Q. When did you see him after he got back from the army? A. I saw him at the station at East Berkshire.

Q. Was there any change in him? A. Why I couldn't tell much just then. He was a little

432 lame on one foot.

Q. How about his expression, how did he look? A. He didn't seem to be so active.

Q. Describe just how he looked right there when he come back, or shortly after when you got a chance to see how he did appear? A. He looked to me just as if he didn't have much courage. That is, he wasn't so active as he was before he went to the army. You see I didn't work with him any after he got back.

Q. Did you see him more or less? A. Yes.

Q. Where was he living at this time? A. 433
Montgomery Center.

Q. With whom? A. With mother.

Q. You were not living at the same place? A. I was living up above.

Q. Do you know how long it was before he started in trying to work? A. It might have been three or four months I guess.

Q. Where did he go to work then? A. I think he went to work there to the Nelson Hall Veneer Mill.

Q. During those three or four months, did he 434
do anything at all? A. Not much I guess, no.

Q. Did his condition improve any during that time? A. It didn't seem to very much.

Q. Then you saw him about the time he went to work for the Nelson Hall people? A. Yes.

Q. Were you working at the same place? A. I was working at the same place nights.

Q. He was on the day shift? A. Yes.

Q. Do you know what his work was when he started in there at this time? A. Well I think 435
he was working around on the vat, handling blocks, logs.

Q. Did he stay there long? A. I couldn't say just how long he stayed there.

Q. Do you know if he did change his employment later on? A. Yes, I knew he did.

Q. What type of work did they give him then? A. They put him inside I think.

Q. You were on the night shift and he was on the day shift,—did you meet some times going and coming? A. I would have to get there

nights before they quit, and in the morning the help would always get there before I quit.

Q. Were you foreman of the night shift? A. Yes.

Q. Were you able to tell whether or not Newton was working regularly? A. Sometimes I would see him when he was to work and other ways I knew just about how much time he was putting in because I had to shift the time cards.

Q. How steady was he working there? A. He wasn't working steady.

Q. Have you a judgment as to how much time he was losing? A. I haven't got any record of it but he didn't put in no half of the time in that time.

Q. Was that so during all that period after the war? A. Yes.

Q. Do you remember about when he got through there? A. Well he got through there I think and went to Richford, or came down to St. Albans; I don't remember. It has been so long ago.

Q. But you do know he was losing about half the time during the time he was working there in Montgomery? A. Yes.

Q. After he once moved away, he didn't live back there in Montgomery any more? A. No.

Q. So you have seen him as he come to see you or you have been to St. Albans? A. Yes.

Q. Have you seen him in these fits? A. Yes.

Q. Do you remember when you saw the first one? A. Well now it was up when I was living at Richford,—why I should imagine it was around 1924 or '5 I think.

Q. And which do you think it is? Have you a judgment as to which year it is more apt to be, whether '24 or '25? A. I think it is in '25; I think it is. 439

Q. What time of the year? A. It was the first of January.

Q. 1925? A. Yes.

Q. Tell us where he was and describe just how this attack was? A. He came up to my place, he came up to stay over night, and at dinner time he sat at table just across from me and I noticed he wasn't eating much. I asked the boy what the matter was, he didn't seem to eat? I see he acted a little different, and he said he wasn't feeling good, and he got up from the table and sat down in my rocking chair there, and I guess he wasn't there over two minutes before he was into one of those spells. 440

Q. Describe how he acted? A. He stiffened right out, his hands and feet and legs, and froth run at the mouth, and his eyes well his eyes looked funny; kind of bulged out; and that afternoon I guess he had six or seven, lasted him fifteen or twenty minutes, some of them half an hour. The fact of it was he had them about all night. I got up in the night and went into his room, and he was into one, and I stayed there a few minutes and spoke to him and he asked for some water, and he would look funny when he come out of them; looked—well I don't know, as if he was lost,—wild;—didn't look right. 441

Q. How long did he stay there at your place that time? A. I was going to say I give him this

442 glass of water and he says to me—"be sure to wake me up in the morning so I can take the train and go home,"—and he came home that morning on the train.

Q. After he had the first one that day, what was his condition all the rest of that day around there? You say he had several other attacks, but between these attacks, what was his condition? A. In between he didn't look right; some of them he had just a few minutes in between; he would be right into another one you know.

443 Q. Did he move around any or just lie there and rest between the spells? A. Well he would lie on the couch some and try to get around.

Q. Have you seen him in some of these at other times? A. I haven't.

Q. How has his condition been since that time in his general appearance and looks and the way he got around and all that sort of thing? A. Well his appearance hasn't improved any I don't think.

444 Q. And has it improved any since he got out of the army? A. No.

Q. His general appearance is about the same now as it was then? A. Yes.

Q. Now these spells he had that day, did he become unconscious each time, in each of these attacks you told us about? A. Yes.

Q. And would he froth at the mouth? A. Yes.

Q. And had all these same effects each time? A. About the same. Some of them he would have—he would thrash around a little more than others, and others he would stiffen right out.

CROSS EXAMINATION by Mr. FitzGerald: 445

Q. You stated, Mr. Lumbra, you saw him when he came home from the army? A. I did.

Q. And his appearance had not changed greatly except that he was lame? A. Oh, you could see that his appearance had changed, yes, some, and he was lame.

Q. On direct examination you said there wasn't much change except he was lame in one foot. Then you have stated his appearance today isn't much different than when he came out of the army;—so his general appearance is as it 446 was when he went in, is that correct, except he is older? A. I stated he hasn't improved any.

Q. But has he retrogressed,—has he grown worse? A. Well it isn't improved; he isn't any better than he was.

Q. I am speaking of his general appearance more than his physical condition, Mr. Lumbra. How is his general appearance today,—isn't it about the same as when he come out of the army? A. I cannot see as there's much difference.

Q. When you and he were both working in 447 the Nelson Hall plant, you didn't supervise his work in any way? A. No.

Q. You were primarily employed as watchman, were you? A. I was night foreman and watchman.

Q. You were in charge of the dryers, weren't you? A. Yes.

Q. And the rest of your duties were as watchman? A. Not all of the time, I didn't watch. There was a watchman some of the time beside me.

448 Q. During this attack during the year 1925, how was his breathing during those attacks? A. Well you couldn't see him breathe very much when he was into them.

Q. Just was there, quiet, so far as his breathing is concerned? A. Yes.

Q. As to his muscles,—you said they were drawn, rigid? A. He would stiffen right out,—his hands and feet.

Q. How long would that rigid condition last? A. Why I don't know; it would last probably
449 fifteen or twenty minutes.

Q. He would be rigid that length of time or from the time he started on that attack until he recovered? A. I don't understand.

Q. Was he rigid these fifteen or twenty minutes, or was it from the time he got the first warning until it passed? A. He might not have been stiffened for fifteen or twenty minutes, but he wouldn't come out for fifteen or twenty minutes.

Q. How long was he rigid, stiffened up? A.
450 I couldn't say exactly.

Q. Three or four minutes? A. Longer than that.

Q. Now you said the attack lasted between fifteen and twenty minutes. You say it is longer than three or four and not fifteen. Where do you say the rigidity passes and he relaxes? A. That is a hard question to answer. I didn't look and see. I know he would stiffen right out and he wouldn't come out of it probably in fifteen minutes.

Q. There was a point during this attack where he did relax, wasn't there? Where the muscles ceased to be rigid and he relaxed? Somewhere in there that happened, didn't it? A. Yes, when he come out of it he would relax, sure. 451

Q. How was his breathing after he relaxed? A. He would breathe funny;—he didn't seem to breathe naturally.

Q. Was it heavy and labored? Slow and deep, or how was it? A. I don't know what you would call it exactly.

Q. Could you hear him breathe then? A. Well, no, you couldn't hear him breathe. 452

Q. He was gasping for breathe, was he, or was he? A. He would kind of—when he would come out of it, you know, he would kind of—just as if he was holding his breath, you know,—and then he was all wilted.

Q. That deep breath and then his breathing was practically normal, after it, wasn't that it? A. It would be after a few minutes.

Q. While in this attack his breath—you had to listen closely to hear it at all, is that right? It was as though he was holding his breath, is that right? A. You could see him breathe but you couldn't hear him breathe. 453

Mr. Sylvester: That closes our case with the exception of our doctors who will be here at two o'clock.

The Court: You have done very well. Come in, gentlemen, at two o'clock, as an accommodation to the doctors. (11:45 a. m.)

454 (Tuesday, Apr. 19, 1932, 2 P. M.)

CHARLES S. SUMNER, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. What is your full name? A. Charles Stewart Sumner.

Q. And residence? A. St. Albans, Ver-
455 mont.

Q. How long have you lived there? A. All my life,—forty years.

Q. At some time did you hold a city position there? A. Yes, sir, until last August I was City Manager for eight years.

Q. During the time you were City Manager was there more or less construction work going on there? A. From 1927 until last year we had a very big program.

Q. Do you know Newton Lambra? A. I do.
456 Q. How long have you known him? A. Why I have known him approximately ten to twelve years.

Q. Did he at some time come to you and request a job of you? A. He did.

Q. Did he have some letter with him that you got from someone? A. No, sir.

Q. Did you give him employment at that time? A. I did not.

Q. Were you hiring help during that period of time? A. Yes, sir, we were.

457

Q. What was the reason you didn't hire him? A. I had seen him have a fit and knew he had fits, and there was a liability there.

Q. And by reason of the fact it would subject the City to liability, was the reason you didn't hire him? A. Yes, sir.

Q. Do you know of any work he could have done without more or less danger to himself? A. Nothing, sir.

CROSS EXAMINATION by Mr. FitzGerald:

458

Q. What year was this in, Mr. Sumner? A. The construction started in 1928 and lasted until last year.

Q. When did he apply for work? A. 1929 was the big year.

Q. And do you know anything about his physical condition prior to 1929? A. Nothing that I had seen. I had seen him have fits since then but not before.

Q. You didn't know anything about his health prior to that time? A. Just what I have heard.

459

Q. Of your own knowledge? A. No, sir.

Mr. FitzGerald: That is all.

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DR. HOWARD H. JOHNSON, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. State your full name and address? A. Howard Horace Johnson, St. Albans, Vermont.

460 Q. You are a practicing physician? A. I am.

Q. Where did you receive your training? A. The University of Vermont.

Q. How long have you been practicing medicine? A. I graduated in 1916.

Q. You have been in St. Albans since then? A. Since July, 1916.

Q. At some time did you see Newton Lumbra? A. I did.

Q. When was that Doctor? A. About May,
461 1931.

Q. Where did you see him? A. I saw him in Kelly's Restaurant.

Q. Were you called there to see him? A. I was in there having lunch and as I went out of the restaurant they called me back, saying there was a man having some sort of a bad spell.

Q. You describe to the jury just the condition you found him in? A. I found him laying on the floor in a convulsion which seemed to be epileptiform in nature. He was frothing at the
462 mouth and biting his tongue, and unconscious.

Q. What did you do for him, Doctor? A. I put the handle of a knife or something between his teeth, so he couldn't bite his tongue, and waited until he come out of the convulsion, or practically out of it, and then I left.

Q. Was there anything further you could do for him other than what you did? A. Nothing. I offered to take him home but someone else said they would take him home.

Q. Do you know of any cure for epilepsy? A. Any cure? No, I do not.

Q. Do you know of any work that this man could do, or anyone could do that is subject to epilepsy, without injuring themselves? A. Well no, I don't know that I do. 463

CROSS EXAMINATION by Mr. FitzGerald:

Q. Doctor, did you ever see Mr. Lumbra except on that one occasion? A. I beg your pardon?

Q. Repeated. A. I think perhaps I have seen him. I don't remember so much about him; —I have treated his family but usually I think he has been away. 464

Q. Did you ever treat him except on that one occasion? A. No I don't remember that I did.

Q. When was it that you did treat him? A. This time that I saw him?

Q. Yes. A. I didn't treat him. I only saw him in the convulsion and stayed with him until he was out of the convulsion.

Q. When was that? A. May, 1931.

Q. May of 1931? A. Yes.

Q. Did you ever see him in any similar attack at any other time? A. No, I haven't seen him very much since or before. 465

Q. Doctor, might that not have been an epileptic seizure? Might it have been from some other cause? A. It had every appearance of being epileptic.

Q. But it might have been from some other cause? A. I would hate to say it couldn't have been.

Q. Do you know of seizures caused by hysteria, Doctor? A. The fits may be caused by hysteria;

466 convulsions;—in fact there are many things might cause convulsions, but usually they don't bite their tongue in hysteria.

Q. Wouldn't it be difficult in seeing a patient in just one attack and not treating him and getting his history, to make a diagnosis as to what caused that attack? A. I wouldn't attempt to make a diagnosis—positive—without seeing him more or getting his history or something.

Q. Then you don't mean to positively state it was an epileptic attack, Doctor? A. It had
467 every appearance of being epilepsy to me. I called it epilepsy without a question in my own mind. I would hate to go on treating the case without seeing him more and making more of a study of the case.

Q. You couldn't state it was, could you, Doctor? A. It had every appearance of being.

Q. Would excessive use of alcohol cause epileptiform seizures? A. Would it cause?

Q. Yes. A. I think it is given as a possible cause of epilepsy, though it isn't rated as high as
468 many other causes.

Q. But that might cause it? A. I suppose it could cause it. There are many things that could cause it,

RE-DIRECT EXAMINATION by Mr. Sylvester:

Q. Which would be the more probable cause, a severe shock or excessive use of alcohol? A. I think different writers sort of stage different things, as—I looked up in Tyson's Practice of Medicine,—late encyclopedia, and the speak of in-

469

jury as causing the most number of cases; that is, the history of injury in these cases far exceeded all other; fright came next and alcohol next.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. Injury to what part of the body, Doctor? A. Not any special—it might be injury to the head, or possibly injury to any part of the body that would cause extreme nervous condition.

Q. Isn't it true that head injuries are one of 470
the principal causes for epilepsy? A. I beg pardon?

Q. Repeated. A. Head injury is one of the causes; is classed as one of the causes.

Q. One of the principal causes? A. Yes.

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DR. ALLAN DAVIDSON, called as a witness by the plaintiff, being duly sworn, testified as follows: 471

Direct Examination by Mr. McNamara:

Q. Your full name is Allan Davidson? A. Yes, sir.

Q. You are a practicing physician and surgeon in the City of St. Albans? A. Yes, sir.

Q. And have been for how many years, Doctor? A. About 36.

Q. And you are chief surgeon with the Central Vermont Railroad? A. Yes, sir.

472 Q. And are you on the staff of the hospital at St. Albans? A. I am.

Q. What is your official position there, Doctor? A. I am a surgeon on the staff of the hospital.

Q. Where did you take your medical training? A. McGill College, Montreal.

Q. You studied at some foreign Universities too? A. Some.

Q. What were they? A. Principally London and Edinborough.

473 Q. Did you take some study in Vienna? A. Slight; a short time.

Q. Were you called to the Railroad offices sometime in '29 to see Newton Lumbra? A. I was.

Q. Do you remember about what time it was, Doctor? A. I should think it was about the first of March, 1929.

Q. Where did you find him that day? A. Well, if my memory serves me right, he was in the First Aid Room.

474 Q. In what condition was he, Doctor? A. He was in a comatose condition, sleeping profoundly.

Q. What was he suffering from at that time? A. They told me he had just had a very severe convulsion. The convulsive part was over when I got there, but he was still sound asleep.

Q. His condition indicated he might have just had a convulsion, did it, to you? A. Yes, sir.

Q. Did you examine him somewhat further at your office? A. I think I did later; a day or two later.

Q. As a result of your examination at the office, together with that one in the railroad office, did you determine what his trouble was? A. I did. 475

Q. And what was it, Doctor? A. My diagnosis was epilepsy.

Q. Now, Doctor, do you know what causes epilepsy? A. No, I don't know the ultimate cause of it.

Q. Can it be definitely determined in any individual patient? A. I don't think that investigation has arrived at a conclusion of what the ultimate cause is. 476

Q. Is there any cure for epilepsy that medical science knows,—any positive cure? A. Not that I know of.

Q. Is a severe shock given as one of the probable causes of epilepsy? A. Yes, it is spoken of as a probable cause.

Q. Assuming that a man suffered a severe shock from a high explosive shell concussion which threw him several feet and left him in an unconscious condition and he was placed in a hospital and began suffering nervous reactions, with pain in the head, perspiration standing out on his forehead, and overcome with weakness so he would have to sit or lie down, and that these spells continued and increased in intensity for a number of years, three or four years, until finally they became so bad he went into convulsions of the type you saw him in, would you say the condition you found him in in '29 was the reasonably probable result of that concussion he suffered in the army? A. Well, I should think that the 477

478 condition I found him in was probably in a measure due to the experience he had gone through.

Q. And have you some theory, doctor, or is there a medical theory on which you base that judgment? A. Why I think that some individuals are born with a nervous system that is not capable of resisting the stress and pressure of social life social conditions, and if those conditions are aggravated or increased, there comes a point at which the tension reaches a
479 point where they cannot stand it any longer, and you get a break. Frequently that break takes the form of a convulsion.

Q. May the break be indicated by something else than a convulsion in the first instance? A. Yes.

Q. And gradually they grow up to the convulsive type? A. I think so.

Q. Now doctor, was this man a safe man to have around working for the Railroad at the time you examined him? A. No, I didn't con-
480 sider him safe.

Q. Did you order the road to dispense with his services? A. I recommended his dismissal.

Q. Do you know any work connected with the Railroad which would be safe for this man to try to do? A. No, I do not.

Q. And assuming that this man's education was limited to that of the Graded School, and his only activity has been that of a laboring man, do you know of any type of labor that he could properly perform, with safety to himself in the condition he now is or was at the time you saw

him? A. No, I don't know of anything he could 481
do where he would be safe from injury.

Q. And has that been the case, Doctor, during all the period that he has suffered with this trouble? A. Why so far as I know.

Q. That is your judgment on it? A. That is my judgment.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Doctor, you said that shock is one of the causes of epilepsy. Are there other causes? A. Yes. 482

Q. Is head injury one of the causes? A. Yes.

Q. Excessive use of alcohol? A. I don't think excessive use of alcohol in the individual is a frequent cause of epilepsy.

Q. Might it not be a cause? A. In my experience I don't think I have ever seen a case.

Q. May excessive use of alcohol cause epileptiform seizures which are similar to epilepsy and not be true epilepsy? A. I haven't seen such a case; possibly it is true. 483

Q. Doctor, you testified in answer to the hypothetical question that Mr. Lumbra's convulsive seizures were probably caused by this shock which he received in 1919 or 1918? A. Yes.

Q. Doctor, until such time as the convulsive seizure evidenced itself, could Mr. Lumbra have worked without endangering his health? A. Well I understand he had nervous attacks previous to that which made it impossible for him to hold a job,—to continue in his work.

484 Q. If a person received the injury which was covered in your first hypothetical question and subsequently had attacks of nervousness, and worked at various occupations over a period of years, and then began having convulsive seizures, up until the time he had that seizure, Doctor, would he have injured himself or endangered himself in any way by continuing to work?

Mr. McNamara: I object to that. That is not based on any evidence in the case and not a proper hypothetical question.

485 The Court: I think it is based on the testimony we have had.

Mr. McNamara: The testimony is this man attempted only one type of work before the period he went into the convulsive type;—that was the work at the mill where they transferred him from one department to another, to lighter work; that he did not work steadily, although the question would lead the witness to believe it was steady, and finally he had to give up that work.

486 That is the only evidence in this case prior to the time the Doctor knew about him at the Railroad.

Q. Repeated.

The Court: The question indicates he had gone on for a period in employment without difficulty, but I guess I will let him ask it just the same.

Mr. McNamara: May we have an exception noted.

The Court: It cannot be worth very much. He may ask it.

Q. Repeated. A. Well I think the work would 487
have been a strain on his nervous system.

Q. Was there any work that he might have done, Doctor, that would not have been a strain? A. Well, I couldn't answer that. There might have been something but I should think any work would increase the tension which ultimately led to the break.

Q. Isn't it true that persons who are nervous are apt to spend too much time thinking of themselves, and if they are employed, their mind is occupied and it is really beneficial rather than 488
detrimental?

Mr. McNamara: I think that is entirely immaterial and not cross examination and doesn't fit the case in question in any way, shape or manner. It is a hypothetical question entirely outside of this case.

The Court: Let him ask it just the same.

A. I should like you to advise what you mean by nervousness?

Q. Doctor, the nervous condition you have 489
told that this man had,—you were told as to a certain nervous condition he had, were you not? A. I heard it in the testimony, yes.

Q. In arriving at your diagnosis and your subsequent testimony after your examination of this man in your office, did you take a history of this man then? A. Yes.

Q. What did he tell you? A. He told me he had these nervous conditions that he couldn't control and that he couldn't go on with his work.

490 Q. How long did he say he had been having those attacks? A. When he went to the hospital, after his injury in France.

Q. These convulsive seizures? A. No, these nervous attacks.

Q. What kind of attacks did he say he had, Doctor? Describe them. A. He said he was uncontrollably nervous and couldn't rest or sleep.

Q. If the man had attacks, Doctor, of dizziness, would that be attributable to nerves? A.
491 It might be or it might be due to other causes.

Q. If he had attacks of headache, would that be attributable to nerves? A. It might be or it might be due to other causes.

Q. It could be due to other causes? A. Yes.

Q. And if a person—if things went black before them, would that be attributable to nerves, Doctor? A. Possibly.

Q. It might be attributable to many other causes? A. Yes.

Q. And the only history of nervousness which
492 you have was such as we have described to you, which might have been caused by other things? A. Possibly.

Q. If during the time he had such symptoms as we have just described, could he not have worked at many occupations Doctor without endangering his health? A. That is a question which I would not undertake to give an ultimate answer to. Personally I think he was handicapped in anything he might have attempted to do.

Q. How severe a handicap, Doctor? A. Well, he had lost his own confidence in being able to do anything. 493

Q. Didn't loss of confidence become evident after the first convulsive seizure? A. Well I think from the history it manifested itself before.

Q. If the man believed that these attacks were going to wear off, would that indicate loss of confidence, Doctor, so long as he had that belief? A. If he had that belief then it ought to help him. 494

Q. It should have helped him to work too, should it not, Doctor? A. Yes.

RE-DIRECT EXAMINATION by Mr. McNamara:

Q. But if he tried to work and these attacks continued and kept growing in intensity and in frequency, then was the work something that was injurious to him? A. I think so.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald: 495

Q. What is the greatest danger to a man who is suffering from epilepsy if he works? A. Well, he is liable to have a convulsion and he might fall and injure himself, or he might get into machinery; he might fall underneath a moving train, or on to a hot stove, or on to a forge.

Q. His greatest danger is the injury he might receive in the throes of this convulsion? A. Yes.

Q. The fact he is occupied by working does

496 not effect that convulsive seizure at all, does it? In between seizures he is perfectly capable? A. Perfectly.

Q. And it does not hurt him at all to work, does it? It is just the danger of injury because of these convulsive seizures? A. Yes, I think that is true.

RE DIRECT EXAMINATION by Mr. McNamara:

Q. Doesn't fatigue, Doctor, tend to increase
497 these seizures? A. I should think it might. I wouldn't absolutely say so; but I should think so.

Q. So if a man could rest, he would be less apt to have them so frequently, is that so? A. I believe that.

Q. Isn't it also a fact, Doctor, with a great number of cases of these epileptic seizures, that where the subject becomes tired, so he has them with great frequency and will have a number of them in a short period of time, that they will eventually break down the brain? A. It fre-
498 quently does impair the mentality.

Q. So that work which brings on the repented seizures is bringing that person probably to a state where there will be absolute insanity in time, is that correct? A. I should say impairment of mental powers.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. What percentage of cases of epileptics result in insanity? A. I don't know; I couldn't tell.

Q. Isn't it a very small percentage? A. I think comparatively small. 499

Q. Isn't it true that many epileptics are carrying on day after day? A. Quite true.

DR. BYRON HERMAN, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara: 500

Q. You are also a practicing physician in St. Albans? A. I am.

Q. You are the Government examiner for the United States Veterans Bureau? A. I am.

Q. As such did you see Newton Lumbra at some time? A. Yes.

Q. In your practice there, when did you first see him? A. I couldn't say exactly but a number of years ago.

Q. Sometime early after the war? A. Yes. 501

Q. Did you treat him at that time, do you know? A. No, I did not.

Q. Do you now have any independent recollection of what his trouble was at that time? A. I don't think he had much trouble at that time when I first saw him.

Q. Do you remember definitely whether he did or not, Doctor? A. I couldn't say exactly.

Q. Later on you started treating him, didn't you? A. Yes, I did.

502 Q. Do you remember when that was? A. I couldn't say exactly; it was at the request of the Government;—they have the record.

Q. Probably around 1926 or '7? A. Why, somewhere in that vicinity.

Q. And for what did you treat him? A. Epileptiform seizures.

Q. Was that grand mal or petit mal? A. I thought it was grand mal.

Q. Some times is it hard to distinguish between the two? A. Why, usually not.

503 Q. Usually there is a very well defined difference, isn't there? A. Usually, in most cases.

Q. Will you explain to the jury just what the two of them are? A. Well, petit mal is a—the greatest difference is it is a slight seizure while the grand mal is a more prolonged affair in which the patient becomes comatose,—sleeps, and is unconscious.

Q. Have you see Newton Lumbra in some of the grand mal seizures? A. Yes.

504 Q. Rather frequently? A. Quite a number of times.

Q. Was there anything you could do for him, Doctor? A. Nothing that I did do.

Q. You did all that you knew how to do? A. All I knew of to do.

Q. Is there any cure for grand mal that you know of? A. Not that I know of.

Q. Are there some aids that are given, some treatments and some drugs that help? A. Yes, that are of benefit.

Q. You have given Lumbra some of those, have you? A. Yes. 505

Q. Have they made any appreciable difference in his condition that you have been able to notice? A. Well, that is theoretical; he still has the seizures.

Q. And with as much frequency as before you started giving them? A. Yes.

Q. Does petit mal sometimes develop into grand mal Doctor? A. I don't believe so.

Q. Are you sure that it doesn't? A. No, I am not sure. 506

Q. It might possibly do that? A. It is possible.

Q. And is an extreme shock apt to bring on grand mal seizures Doctor? A. It is classified as one of the causes.

Q. One of the chief causes? A. Yes, one of the chief causes.

Q. And is shock of the type of a man being thrown by the concussion of a high explosive shell a type of shock that would be apt to bring on this type of seizure? A. It is possible. 507

Q. Rather probable? A. Well, no, I wouldn't say probable.

Q. Well if the person developed grand mal seizures, the true epileptic seizures, after having undergone such a concussion, would you say that the cause of the epilepsy was very probably the concussion through which he had gone? A. I would say it was probable—possible.

Q. Would you say, Doctor, that petit mal, the lesser seizures that are somewhat similar but

508 lesser in degree and don't bring on unconsciousness, that they also are a probable result of an extreme shock? A. A possible; I don't say they're probable at all; they're possible.

Q. Assuming that a patient had the petit mal seizures after having undergone a severe concussion, being thrown several feet and picked up unconscious and remained unconscious for some little time after the concussion and then developed the petit mal seizures, would you think they were a probable result of that concussion? A. I
509 would say they were a possible cause of it.

Q. You would have to know the patient's former history? A. I don't know the cause of epilepsy.

Q. Does anyone know what it is? A. No, sir.

Q. There are various theories, aren't there, Doctor? A. Yes there are a number of theories.

Q. Assuming that a man who is subject to these grand mal seizures had such education that the only work he could do was that of an ordinary laborer, is it safe for him to try to work
510 when subject to these attacks? A. I believe so.

Q. At what type of work, Doctor? A. Why any sort of work where he would not be in close contact with machinery; that is, any form of labor he was able to do.

Q. Do you think it would be safe for him to try to dig ditches? A. Why, I think it would be.

Q. Do you think a fall from the top of a ditch into the ditch in these seizures would not be harmful? A. It would be dangerous.

Q. It would be dangerous, wouldn't it?

Mr. FitzGerald: I submit this is cross examination. 511

The Court: Most all of it is.

Mr. FitzGerald: I object.

The Court: I think as you have sat here so long, I will rule as a matter of discretion it may go on. That is all we have had since the trial started;—on either side.

Mr. Fitzgerald: Exception.

Q. Could such a man safely work around a machine shop or railroad shop, Doctor? A. No, sir. 512

The Court: That is more cross examination.

Mr. McNamara: If the Court please, this Doctor is a Government doctor.

The Court: Suppose he is? That doesn't change the law of evidence.

Mr. McNamara: He isn't strictly our witness.

The Court: You put him on the stand. He is in fact your witness—strictly or loosely—either way. 513

Mr. McNamara: This is a type of matter that requires cross examination I believe.

The Court: No, it isn't a matter that requires cross examination.

Mr. McNamara: We will try to examine without.

Q. Will you tell us the various types of work you think this man could do safely without injury to himself? A. Why, as I have said, I

514 think he could do forms of labor in which he was not in contact with machinery.

Q. Do you think that farm work? A. Some forms of farm work I think he could safely do.

Q. What forms? A. He could work in the garden.

Q. Do you think that is a type of work in which he could earn a living? A. That is questionable.

CROSS EXAMINATION by Mr. FitzGerald:

515 Q. Doctor, you examined Mr. Lumbra for the Veterans Bureau back in 1920? A. Yes, sir.

Q. I hand you herewith, Doctor, Defendant's A for Identification and ask you if you will please tell what report was made by you at that time of the man and what his trouble was at that time? A. (Reading.)

Claimant's name—Newton Lumbra, Private 103rd Machine Gun Battalion, July 13, 1917 to April 29, 1919.

Present address—Montgomery Center. Age—

516 28.

Color—White. Previous occupation—Lumberman.

Brief military history of Claimant's disability:—Never sick in army; Hospital once for sprained ankle in France.

Became sick after getting home.

Present Complaint—Rheumatism, throat trouble, husky voice.

Diagnosis:—Articular rheumatism; chronic;—Laryngitis—chronic.

Degree of vocational handicap—negligible. 517.

Q. Those words "never sick in army"—they are in quotation marks. Is that for any particular reason? A. That is what the man told me so I put it in quotation marks.

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DR. ALBEE A. SKEELS, called as a witness by the plaintiff, being duly sworn, testified as follows:

518

Direct Examination by Mr. McNamara:

Q. Your full name is Dr. Albee A. Skeels? A. Albée A. Skeels.

Q. You are a resident of St. Albans? A. Yes.

Q. You are a physician? A. Yes.

Q. Will you just tell us what your medical qualifications are, Doctor? Your study and various things of that nature. A. I am of McGill, Montreal,—eight years. I have taken—done some work since, in Vienna. 519

Q. In what type of work did you take in Vienna? A. General medicine and nervous troubles.

Q. When was that you took that work, Doctor? A. Let's see—1925 I think.

Q. You were in the army, Doctor? A. Yes.

Q. With what army? A. With the British Army,—The Imperial Army.

Q. How long were you with the British Army? A. Between five and six years.

520 Q. As a Captain? A. Yes.

Q. Of the Medical Corps, of course? A. Yes.

Q. How many years active service did you see during the actual fighting war? A. Over three years.

Q. On what front? A. I was in France, I was with the Serbian Front I was with the Serbian Army for two years, attached to the British —but attached to them, and I was in Italy during the war, and after the war I was in Egypt.

Q. Also with the army? A. With the army
521 all the time.

Q. In your army experience, Doctor, did you come in contact with mental and shell shock cases? A. Yes.

Q. Did you make some study of them? A. Yes.

Q. You have become acquainted with Mr. Lumbra's case in the last few months? A. Yes.

Q. Just before the other trial, was it? A. Yes.

522 Q. Will you tell us just how you happened to become acquainted with this case and interested in the matter? A. He come over to my office and naturally began to speak about his case, and I immediately thought of a case in a friend of mine exactly similar to his, and cases I had already seen. Now it is a question in my mind then whether it is a case—you talk about shock—that is a very, very loose term,—you see, shock means a lot;—if I tell a man he's had a shock, in most people it means apoplexy or he had a nervous shock; it may mean simply nervousness,

neurosthenit. To my thinking it is a question of drawing a line between a functional trouble, that is a trouble due to nervousness what we say "hysteria" or an actual organic trouble. Now as I grow older, I very much doubt a good many cases of so-called functional trouble they're not really organic trouble. For instance shell shock in many cases is called a sort of functional disease, a disease of the nerves. You know what I mean a woman is nervous at times, it is a different thing; nervous is a very, very loose term and so is shock. Now in many cases of shell shock there's some organic basis to it; there will be blood in the spinal fluid.— 523 524

Mr. FitzGerald: I submit it is not responsive.

The Court: It doesn't matter if it isn't —it's all admissible, isn't it?

Mr. FitzGerald: May I have an exception?

The Court: If it doesn't relate to the case, I will sustain your objection, but I won't sustain it because it is not responsive to the question. 525

Mr. FitzGerald: I don't think the fact the Doctor has a friend with the same type of trouble—I don't think it is admissible, —the type of testimony that has been given.

The Court: It doesn't make any difference whether the cases he has seen are all friends or strangers. He can refer to his patient as a friend, or refer to him as

526 a stranger,—it doesn't make any difference; it shows his experience.

Mr. FitzGerald: He doesn't say he has examined Mr. Lumbra at all.

The Court: He says he came to his office.

Mr. McNamara: May we show he did go into Mr. Lumbra's case and learned the history?

Witness: He did.

The Court: Go on.

527 Witness: Now, the question,—of course, I don't want to act as his attorney, your Honor.

The Court: There isn't any danger of that, Doctor. Go on and tell the jury.

A. (continued) The question in my mind is whether it is a functional thing or not. So, as I say—I have been rather skeptical about people unless they're absolutely "malingerers",—that is a term they use in the army for people trying to make out they're disabled or have some trouble 528 when they haven't; in other words—"skrinshankers"—which isn't an uncommon ailment in the army and especially after the army. Now, as I look on the case, he has apparently nervous seizures. Now, the question of their being petit mal—I have never seen anyone, and I don't know that anybody else has,—but it's an indefinite thing,—they lose consciousness for a very short time. For instance—they're eating and might drop their fork,—and if talking—they might stop the flow of their conversation and then go on

with it; that is one type. Now, I have listened 529
to the evidence of two practitioners who are experienced men—Dr. Davidson and Dr. Johnson—he saw him in the actual convulsion. Now, leaving aside the petit mal, he certainly had actual convulsions because his tongue was bitten and he was unconscious afterwards. Now, you cannot imitate that, as is apparently done, but you wouldn't deceive a doctor. You don't bite your tongue and don't void urine involuntarily, as he told me he did,—and two doctors, Dr. Davidson and Dr. Johnson who saw him have a convulsion, 530
and good practitioners saw him. It isn't a question of that man malingering or having hysteria, —a functional attack, as sometimes they have, but he absolutely had an epileptiform convulsion to my thinking, and I would swear it on a stack of bibles on that evidence, so the whole thing to my thinking is—what is the cause of it? He never had convulsions of any kind in childhood, —I am not going into the cause of convulsions in childhood—but as applies to his case; straight epilepsy is a disease that develops before puberty 531
and very rarely after twenty. Now, this boy had convulsions I say—he was twenty-five to thirty; —now, the cause of those in a great number of cases is some local lesion in the brain. Now, in looking over his case—naturally a man in the army,—a man who is trying to get his rights,— I was thinking what could be the cause of that. He told me he was thrown forty feet, and as I understand he has evidence to prove that; now, you take a high explosive shell—what they call

532 "big stuff" six, eight, nine inch stuff, going at
the speed I wouldn't want to estimate the speed
but you have all had experience, most people
have, with dynamite, and when you think of
high explosive it is in the class with dynamite, only
more powerful, going with such speed, you
can imagine what a terrible shock it is. He was
thrown forty feet. Now, the brain is not a rigid
organ at all and you don't necessarily have to
have a fracture of the skull to have an injury
that will cause convulsions afterwards. You
533 don't necessarily have even a spicula of bone
tissue in the inner part of the bony covering of
the brain to cause a convulsion. You might get
a pouring out of blood in greater or less degree,
and one of the peculiar things about it is this,
that you don't necessarily have a true epileptic
convulsion or an epileptiform convulsion until a
period of years. For instance, you may get a
thickening of the tissues and fibrous tissue form-
ing. You know how a thickening what we call
in the country "proud flesh" how you get a
534 large scar eventually. You might get this scar
tissue and as time went on, this tissue might con-
tract and cause an irritation to the brain and
cause convulsion.

Q. And could the convulsion, Doctor, develop say two or three or four years perhaps, or even longer, after the original injury to the brain cell?

A. Yes; absolutely.

Q. And is it consistent with that Doctor, that before the real convulsions develop, that this man could have nervous seizures of the type you have

heard testified about here today, that the perspiration stood out on him, he becomes tense and things go black before him, is that consistent with the growth of this type of thing? A. Absolutely. I have a great deal of skepticism about these purely functional cases; in the most of these cases I think there's some physical or organic basis to it. 535

Q. Doctor, can a man carry on consistently in employment when he is suffering from these convulsions such as you have heard described and know are the history in this case? A. No. 536

Q. Has he been able to any of the time consistently since he received that injury, in your judgment? A. I don't know to be perfectly frank, I don't know when these smaller seizures commenced.

Q. Assuming they commenced while still in the army, before he left the army at all, and continued all the time until they went into the convulsion type? A. I would say it would be very difficult for the man to carry on his regular vocation that had spells like that: We all know, when we are dizzy we become frightened, when we take dizzy or faint; that is my opinion. 537

CROSS EXAMINATION by Mr. FitzGerald:

Q. When did you first examine Mr. Lumbra? A. I couldn't tell you the day.

Q. Well the month? A. Why it was sometime before he came to Court here.

Q. You mean at this trial—in between the two trials? A. No, the previous trial.

538 Q. It was sometime right about that time. When he called at your office at that time, did he call for the purpose of having you examine him? A. No, he called on another errand, and then he spoke to me about his case and wanted my opinion, and to look him over.

Q. Did you do any more than just take the history that day? A. I took the history, yes. There is nothing in his history that would show —

Q. You didn't make any examination at that
539 time? A. Perhaps his reflexes, or something.

Q. You have no record of such examination, Doctor? A. No.

Q. Now, this history of involuntary voiding of urine, from whom did you obtain that? A. From him.

Q. You didn't mean to say that Dr. Davidson or Dr. Johnson testified that way? A. No, I don't know whether that came in the testimony.

Q. That isn't your recollection of their testi-
540 mony? A. No, I don't know except he bit his tongue.

Q. Doctor, you say there is no true epilepsy, —no true convulsion,—unless it began in puberty? A. I said very rarely idiopathic—straight epilepsy—rarely began after twenty; very rarely, and mostly before puberty.

Q. How about traumatic epilepsy? A. Ah! That can come any time.

Q. What is the probable cause for that, Doctor? A. Well, now, are you meaning this specific case or in general?

Q. No, we are speaking of the cause? A. Why my dear man, they're multiple; they're multiple. 541

Q. What is the primary cause for idiopathic epilepsy? A. I don't know and nobody else.

Q. What class of epilepsy is generally brought on by an injury? A. You can get straight epileptiform convulsions with loss of consciousness, or you can get "Jacksonian" where you don't get loss of consciousness, or you get it late in the seizure.

Q. Doctor, those injuries you referred to, you mean head injuries didn't you, Doctor? A. Yes, 542
but they might be an injury—a man may receive a head injury at the same time he gets another; a man may get a fractured skull and get a broken leg; the two things come together sometimes.

Q. The evidence in this case which you said you have been listening to is the man received an injury to his ankle? A. Absolutely.

Q. There was no evidence of or testimony of a head injury at all? A. That might not show. He might not know it. He was unconscious and had concussion, which has been shown in the evi- 543
dence, and unconscious.

Q. Would an injury to the ankle cause epilepsy? A. No, not unless there was some underlying cause.

Q. May epileptiform seizures be caused by the excessive use of alcohol? A. Theoretically; I never saw but one case.

Q. That is possible though, isn't it? A. Oh, in for instance where you get some irritation of the brain from excessive use of alcohol, you could get it, but not a very common cause.

544 Q. Isn't that accepted as one of the causes, Doctor? A. From a relative standpoint, no, I should say. It is easy enough to say such a thing could be a cause but the relative frequency of it makes a big difference.

Q. What is the most frequent cause? A. It develops in childhood.

Q. Isn't traumatic epilepsy apt to develop much after childhood? A. Oh, for instance, a child could be born with severe labor instruments used you would get an extravasation of
545 blood in the brain and develop epilepsy later on; or as you know, a child might eat something you are probably all family men may eat something and get convulsions; that is not true epilepsy. Where you get true epilepsy developing, it is usually in childhood and before puberty.

Q. Doctor, you testified that traumatic epilepsy could come on at any time? A. I didn't say at any time.

Q. It might be five years or so afterward? A. I wouldn't want to limit myself.

546 Q. Five years after what? A. After the initial injury.

Q. That means that if an adult were to receive an injury today, sometime within the next five years he might be subject to epilepsy? A. Not necessarily.

Q. I said he might be? A. If a man received an injury today—an injury to his head—now you mean to the head?

Q. Yes, to the head. A. An injury to the head that caused some extravasation of blood or

inflammation of the membranes, it could come on 547.
several years afterwards.

Q. Now, Doctor, from the time he received this injury until the seizures developed, is he injuring himself, or endangering his health in any way by working, Doctor? A. May I ask that be repeated?

Q. Repeated. A. Well, now that is a supposition contrary to fact because he had certain seizures up to the time of his grand mal his severe seizures, fits.

Q. You were asked a question. By that I 548.
meant the man may, hypothetically, receive the injuries today and may develop epilepsy five years from now?

Mr. McNamara: He isn't asking it on a fair basis. He is asking it as though it may be the indefinite man and applying it to the present case. The Doctor has answered on the present case.

Q. I am speaking of this hypothetical case, 549
where the man received an injury today and develops epilepsy four or five years from now. In between times is he injuring his health or endangering himself any by working, Doctor? A. Granted that he has no nervous seizure of any type in between the time that he was injured and he had these convulsions, he would not; no, sir.

Q. From the history you obtained of Mr. Lumbra, do you believe he had true epilepsy? A. At that time you mean did he? You mean did he have petit mal? Do you mean that?

550 Q. No, I am asking do you think Mr. Lumbra has true epilepsy? A. He might have that.

Q. What do you think? A. I think he had. I think he had petit mal but I wouldn't want to swear to it because I have never seen him in an attack. He might have it and not know it himself, but I think that he had it from the history.

Q. At the last trial you testified "to my way of thinking he did not suffer from idiopathic epilepsy but has epileptiform convulsions". What do you mean by that? A. Absolutely; that is
551 perfectly logical. You cannot separate epileptiform convulsions in an arbitrary way. For instance, for some unknown cause a man develops epilepsy, he might have these nervous seizures from an injury,—slight nervous seizures—and then go on to his grand convulsions.

Q. Well, Doctor, what do you think Mr. Lumbra has? A. I think he has had an injury to his brain. He had an extravasation of the blood in his brain or in his meninges, more or less, which has caused this trouble. He has developed it late
552 in life, after puberty; and that is my true conviction.

Q. You believe he has grand mal epilepsy caused by the head injury? A. From the history, I do.

Q. Isn't it true, Doctor, that grand mal epilepsy caused by head injury, does not develop from petit mal to grand mal? A. I don't know that he had petit mal, but he had certain nervous seizures. As I told you at first, I wouldn't want to say the man had nervous seizures, and the old-

er I grow and the more I see, the more skeptical 553
I am of these nervous seizures not being based on an organic trouble.

Q. Would you exclude petit mal, Doctor? A. I have never seen him. I don't want to swear to a thing I have never seen. I know he had some nervous seizure and to my firm belief, it was founded on some organic, physical trouble.

Q. If it was founded on an organic, physical trouble, what would that trouble be classified as, Doctor? A. Well, I shouldn't call it shell shock from the first. I should say it was some cerebral 554
extravasation of blood.

Q. Would you call the result epilepsy? A. To all intents and purposes, yes.

Q. Would that be petit mal epilepsy from the time he began the history of this nervous condition, was he suffering from petit mal? A. Frankly I don't say he suffered from petit mal. I didn't see him, nor has anybody else seen him that I know of, and I wouldn't want to swear to what I don't know from actual knowledge. He might not know he had petit mal. 555

Q. You have accepted his history as being correct? A. Yes, substantiated by the evidence of two well known practicing physicians in the town I live in.

Q. And the testimony you heard from the practicing physicians, Doctor, was what they classified as grand mal epilepsy when he had the convulsive seizure? A. Well, I don't believe in hard and fast rules. Perhaps you know a woman in labor may have Brights Disease and have ec-

556 lampsia—she has convulsions;—to all intents and purposes they are just as serious and more serious—absolutely a picture of epilepsy. To my thinking epilepsy is a symptom of some trouble, epileptiform convulsions are simply a symptom.

Q. Your final analysis in this case, Doctor, is that he has seizures of some kind and you don't know what causes them, is that right? A. Not a bit of it. I firmly believe he has epileptiform convulsions, which is practically epilepsy,—which *is* epilepsy, and they were caused by an injury
557 he had from the high explosive—thrown forty feet.

Q. You are accepting that primarily on the testimony of Dr. Davidson and Dr. Johnson, is that correct? A. No, the other testimony,—testimony of his injury during the war.

Q. I mean so far as the convulsive seizure is concerned. A. Yes, and his own history.

Q. Prior to the time he was first observed in a convulsive seizure by Dr. Davidson in 1929, and other testimony in here,—the first was in 1923,
558 —prior to that, Doctor, what was his condition? A. I don't know because I—

Q. Would you say that was petit mal in between times, Doctor? A. I wouldn't want to be specific because I don't know, but he had some nervous seizure.

Q. But you cannot classify that as petit mal? A. I don't know enough about it. A man cannot tell about his own symptoms. He might lose consciousness—he may not know. I wouldn't want to say that.

Q. But isn't it true, Doctor, that after a per- 559
son reaches maturity and they have traumatic epilepsy, that it doesn't go from petit-mal to grand mal? A. Well, I am not—I don't want to be dogmatic, and if you remember, I have been very careful to say that I didn't know he had petit mal. He had some type of nervous seizure which I thought was based on some organic trouble.

Q. If he had this type of nervous seizure which you wouldn't classify as petit mal epilepsy, —is that right? A. I don't say,—I am keeping 560
absolutely neutral; I wouldn't say one way or the other.

Q. If he had this nervous seizure—(interrupted) A. It may be petit mal.

Q. (continued) from 1918, these passing spells of dizziness, up until he had his first convulsive seizure in '23, which is the earliest date I believe, —is there any reason why he couldn't work in between times? A. What was his labor?

Q. Is there any occupation he could do, Doc- 561
tor,—Filling Station Operator, Watchman, Cashier, or anything? A. Well, that depends on the frequency that he had these spells; that depends.

Q. Doctor, you say there's a nervous spell of some kind. Isn't it a fact, Doctor, if you keep a nervous person occupied, it is beneficial rather than detrimental? A. You are crossing the line; —there's a line between what we call functional nervousness,—but if you have some organic trouble you are distinctly worse off. Nervousness is a very loose term,—the same as shock is.

562 By the Court:

Q. It is a broad term? A. It is a broad term.

By Mr. FitzGerald:

Q. You testified to "organic trouble". You mean a brain condition of some kind? A. Yes, or of the nervous system.

Q. You say if there's scar tissue there? A. Yes.

Q. Would the X-ray show that? A. No.

Q. There would be no means of determining

563 that at all? A. No.

Mr. McNamara: The plaintiff rests

(3:15 P. M.)

(Recess.)

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## DEFENSE.

CHARLES H. DOMINA, called as a witness by the defendant, being duly sworn, testified as

564 follows:

Direct Examination by Mr. FitzGerald:

Q. Mr. Domina, please state your name, address and occupation. A. Charles H. Domina; my address is Montgomery, and I am now in the mill business—lumber business.

Q. How long have you resided at Montgomery? A. Practically all my life,—born and brought up there; lived there all but about eight years of my life.

Q. Do you know Newton Lumbra? A. Yes. 565

Q. You have known him how long? A. Oh, since he was a young kid.

Q. Did you know him before the war? A. Yes.

Q. Did you see him when he returned from the war? A. Yes, shortly after, I think.

Q. Did he work regularly before the war? A. Not as I remember.

Q. And after his return from the war, did he reside at Montgomery? A. Yes.

Q. Did he work regularly there? A. No, he 566
did not.

Q. Did he work any more irregularly after he came back than before the war?

Mr. McNamara: I object.

The Court: Admitted.

Mr. McNamara: May I state my objection? We say he is not competent to make a comparison. He can testify to the facts but he hasn't any right to testify to his judgment.

The Court: Tell how much he worked 567
before and how much afterward.

Mr. McNamara: This question asked for a comparison between the two.

The Court: Objection sustained.

Q. Do you know whether or not Mr. Lumbra was a drinking man and how do you know?

Mr. McNamara: I object to that.

The Court: We haven't had any doctors testify that this man's condition is due to the use of alcohol.

568 Mr. FitzGerald: They all testified it might be.

The Court: But none said there is any probability to believe it is true in this case.

Mr. FitzGerald: They all said there's a number of causes.

The Court: I think to be perfectly fair in this case, that the Government should first show that his condition is due to the use of alcohol, or there's some reasonable probability of it having affected it. In-
569 stead of turning the trial into a trial of the man's character and habits, we should try his case, it seems to me.

Mr. FitzGerald: We are offering this testimony, your Honor, for three purposes: —credibility,—to show loss of time from work, and to show the possible cause of his condition.

The Court: But you haven't put in any evidence that tends in the least to show his epileptic fits are due to his use of alcohol.
570 Now, it is true, of course, that you asked the Doctor if such a thing is possible. Why, yes,—it is possible. It is possible you will fall down tonight when you go to your hotel and kill yourself, but not probable. Now, if you really want to try the case, you should try to show there's some reasonable ground that the use of alcohol caused his condition,—is the cause of his fits. Now, there isn't any evidence to that effect here. The evidence on the other hand

is that this is a functional disturbance; 571
the evidence is he injured his brain at the time of the shell explosion, and when he became unconscious. If you have any evidence or are going to produce any to tend to show his fits are caused by the use of intoxicating liquor, you should put that in first.

Mr. FitzGerald: If the Court please, all the medical testimony here has been that epilepsy may be caused by many things. Dr. Skeels is the only one who stated it 572
was his firm conviction it was caused by his injury in France, and we hope to show there was no injury received in France.

The Court: Why not start the trial in that way?

Mr. FitzGerald: This particular witness wants to get home.

The Court: It would be better for his wants to go unsatisfied rather than to do a wrong to this plaintiff.

Mr. FitzGerald: We wouldn't do any 573
wrong to the plaintiff intentionally.

The Court: It wouldn't help him any whether done unintentionally. I have a very clear recollection of the trial.

Mr. FitzGerald: May I have an exception to your Honor's ruling?

The Court: Yes. I am just postponing this. Put in your other evidence first. The Court isn't willing to turn this into a trial of the soldier's habits in life. The ques-

574 tion is:—Is he incapacitated and entitled to his insurance?—not whether he becomes intoxicated,—unless there's some evidence here that the use of intoxicating liquor is the cause of his disability.

Mr. FitzGerald: Your Honor, there's evidence it may be the cause.

The Court: That is way away from the real issue. It may be a great many causes of his condition; a great many possible causes. Now, I won't exclude your evi-
575 dence. I just say you postpone this evidence and see what your evidence is going to be as to whether his condition is caused by the use of intoxicating liquor. I won't exclude it now, but I just ask you to postpone that part of your case, notwithstanding your witness' necessity to get home. That is unimportant.

Mr. FitzGerald: If the Court please, it will be impossible to attribute alcohol as
576 being the cause without showing the use of it.

The Court: No, you have this man's condition here—all his symptoms,—you have his career,—now is there any professional man—that would be an expert question,—who will say his condition may have been caused by the use of intoxicating liquor? Another thing about that he did not have this disturbance before this explosion in France, but he did right after that, in mild form, and they have been in-

creasing and more severe. I will ask you 577
to postpone this part of your case until after we see what the other doctors are going to say about this.

Mr. FitzGerald: I don't think it would be fair to ask doctors to say this was the cause; the possible or probable causes are too numerous.

The Court: I think it would be very fair, and I think it would be very unfair without asking a doctor first that question. 578

Mr. FitzGerald: If alcohol is the cause of this man's condition?

The Court: Yes.

Mr. FitzGerald: Your Honor, no doctor could say it. The doctors who have already been on the stand have said it is a possibility. Whether it is a probability or not is for the jury to decide.

The Court: I shall not submit it to them to decide unless there's some evidence to support it. That is fundamental for hundreds of years. 579

Mr. FitzGerald: I am trying to put in that evidence to support that hypothesis —that is the cause.

The Court: You just said you don't expect any doctor to testify to that, and it certainly is an expert question. If a doctor cannot give an opinion on it, it is the plain duty of the Court not to let the jury decide the question, because it would be on

580 a mere guess. No question can be submitted to the jury to decide that there isn't any evidence to support.

Mr. FitzGerald: I submit there's evidence in there that there's a possibility that is the cause.

The Court: It should not be submitted to the jury if it is a possibility. It has to be a probability.

Mr. FitzGerald: It is being offered, Your Honor, to show loss of work.

581 The Court: You say the use of intoxicating liquor has a bearing on a person's credibility, and I will pause here to have you bring me some law on that question.

Mr. FitzGerald: I wish to apologize. I was mistaken. I meant his conviction would be admissible.

The Court: On that question you are right. His conviction would be but not as bearing on the cause of his disease.

582 Mr. FitzGerald: It may be also offered to show probable or possible loss of time from work. This man has stated his broken employment; worked and was off; may the jury not consider the fact that that might have been caused by things other than epilepsy?

The Court: Yes, of course, it may. A man may go hunting and lose some time, or go fishing and lose some time, or be sick and lose some time, or go to the circus and lose some time. If you can show he

was drunk and lost time, not because of his health, I will admit it for that purpose, —because he was drunk,—not because of ill-health; that is admissible. 583

Mr. FitzGerald: All right, your Honor.

The Court: That must be shown; of course, at the time he lost the time. A man is entitled to his insurance even if he does take a drink or become intoxicated. The Government made a contract with this plaintiff by which it agreed to insure him and didn't put into that if he got intoxicated it would become void. We should be very careful here to try this man's case on his policy,—his insurance that he bought from the Government, and not on his habits. No matter what kind of a man he is, he is entitled to his insurance, if he's drunk all the time, unless his drunkenness is the reason for his ill-health. Have I made that clear to you gentlemen? A man steps up to the Government and buys his insurance policy of them, or the Metropolitan Insurance Co. and buys a policy of them, and sues them—why it isn't a defense that they can interpose against paying the insurance because the man got drunk on one or more, or on all occasions unless his drunkenness has caused his disability. Now, in this case, if this plaintiff, this soldier boy, was disabled while he was in the war, he is entitled to his insurance, if he's been drunk all the time ever since. 584 585

586 his discharge, unless the fact is that he was not disabled by reason of his service in the war but has become disabled by reason of his drunkenness since the war. Have I made that clear to you? Now, as I said yesterday, we should try this man's case and try the Government's case and decide it and decide it right. It is the duty of the Court not to submit any question to the jury to decide unless there's some evidence to support those questions. Whether there's any evidence in the case to support a given question is a question of law for me to decide, but if there's evidence to support a question, then it is a question for you to decide.

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Mr. FitzGerald: I submit there's some evidence in there—all of the doctors have given that as a possibility.

The Court: We will stop here and let you consult the books and show me some law to that effect. It hasn't been written in the books yet so far as I have had occasion to look at them, but on the contrary, the rule is just the reverse. Unless there's some evidence in the case more than a possibility—unless there's some evidence tending to show probability the fact is so, then it is not a question for the jury to decide. Now, that has been the law for a good many hundreds of years. Now, on your question that his drunkenness is the reason

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he did not work more, we leave that open for you but it must be connected;—he did not work on certain such occasions because drunk,—but the evidence must be strong and convincing enough to show such continual intoxication—to show the inference is he could not work because intoxicated. 589

Q. State whether or not, Mr. Domina, you have had occasion to arrest Mr. Lumbra for drunkenness and the result of that arrest?

Mr. Sylvester: We object to that. That doesn't show a conviction. A conviction might not follow. 590

The Court: It would not be necessary to show a conviction to show he did not work because he could not.

Mr. Sylvester: He should show first he was working at this specific time.

The Court: To make it reasonably probable,—you cannot expect to name the exact, date,—but to make it reasonably probable. He can tell about his being drunk. Come right to it. How drunk he was and how long. 591

Q. Repeated. Did you ever see Mr. Lumbra drunk? A. No, sir.

Q. Did you ever arrest him for that charge?

The Court: Wait a moment.

Mr. Sylvester: I object to that.

The Court: Excluded. Prove that by the records of the Court. The fact he was arrested is not admissible either; he says he never see him drunk.

592 Q. Did you ever see him drunk on any occasion?

Mr. Sylvester: I object to that.

The Court: You asked him that and got "no" for an answer.

Q. Did you? A. You asked me if I ever saw the man drunk, did you not?

Q. Yes? A. And I said "no".

Mr. FitzGerald: That is all then.

Mr. Sylvester: No cross examination.

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W. J. WRIGHT, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. State your name, address and occupation. A. W. J. Wright, general merchant and postmaster, Montgomery Center.

Q. Do you know Newton Lumbra? A. I do.

594 Q. How long have you known him? A. Always.

Q. Do you know whether he worked regularly before the war? A. He did not.

Q. You saw him before he went to the army? A. I did.

Q. Did you see him on his return? A. I did.

Q. State whether or not there was any difference in his appearance from the time he left until he returned?

Mr. MeNamara: I object to that.

The Court: Admitted.

595 Mr. McNamara: That is calling for a conclusion.

The Court: That is all right.

Mr. McNamara: Exception.

Q. Repeated. A. I didn't observe any, no; there was not.

Q. State whether or not there was any difference in his movements, as to whether he was faster or slower when he returned?

Mr. McNamara: I object.

The Court: Admitted.

596 Mr. McNamara: Exception.

A. None that I observed.

Q. Did he work any more regularly after the war than he did before the war? A. Irregularly.

Mr. McNamara: Objected to.

The Court: He ought to tell what he knows about his work before and what he knows about his working after, and then the jury can say whether more or less.

597 Q. Did you know about his work before the war from observation? A. I do.

Q. Do you also know about his work after the war from observation? A. I do.

Q. Was there any change?

The Court: Excluded. Tell how much he knows about it before, and tell what he knows about his working after.

Mr. FitzGerald: That is what I want him to say, your Honor.

The Court: You asked him just to the

598 contrary and just what the Court excluded.

Q. State what you know about his working before the war and what you saw after.

The Court: Tell how much you saw him work before and how much after.

A. Well, I saw him work some but not regularly before the war, and I didn't see him work regularly after the war, although he did work some after the war.

Mr. FitzGerald: That is all.

Mr. McNamara: No cross examination.

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GEORGE H. CHAPEL, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. State your name, address and occupation?

600 A. George H. Chapel, Montgomery Center, Vermont; occupation, clerk in store.

Q. Do you know Newton Lumbra? A. Yes, sir.

Q. How long have you resided in Montgomery Center? A. Since 1916.

Q. Did you know Mr. Lumbra before the war? A. Yes.

Q. Did you know him after the war? A. Yes.

Q. Did you see him shortly before he went into service? A. Yes.

Q. Did you see him shortly after his return? A. Very soon after his return.

*G. H. Chapel, for Deft., Cross.*

Q. Was there any difference in his appearance from the time he went away until he returned? A. I couldn't see that there was. 601

Q. Do you know anything about his industrial activity, whether he worked or not?

The Court: He can tell what he saw.

Q. Did you ever see him work at any time? A. I never did.

CROSS EXAMINATION by Mr. McNamara:

Q. You were working yourself, weren't you? A. I worked in the store. 602

Q. And pretty regularly employed? A. Yes, sir.

Q. So you were not out around looking to see where the other people were working? A. No.

Q. Whether they were working or not. Probably you didn't see anyone in town working, did you? A. Well, I could usually tell what—

Q. I asked what you saw? A. Well, I see them come by to the mill; go by the store to work. I have never seen anybody working unless I have been to the mill. 603

Q. You never have been out around farms to look and see if people on the farms were working? A. Only when I had occasion.

The Court: Isn't that enough?

604 DR. WALDO J. UPTON, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. Please tell your name, address and occupation, Doctor. A. Waldo J. Upton, Burlington, Vermont, occupation, physician.

Q. State your medical education and training, Doctor. A. Well, I graduated from the Univer-
605 sity of Vermont in '98; I was ten years at the State Hospital at Waterbury, and I have done post-graduate work at different times in New York, and since 1920 I have been Superintendent at the Lake View Sanatorium for nervous cases.

Q. Do you specialize in any branch of medical science? A. N. P. cases.

Q. What does that mean, Doctor? A. Neurology and Psychiatry, is what it means.

Q. In lay language nervous and mental diseases? A. Nervous and mental diseases.

606 Q. Have you had occasion to examine Newton Lumbra, Doctor? A. Yes.

Q. Is he the gentleman at the counsel table? A. Yes.

Q. When did you first examine him, Doctor? A. In 1924 as I recall.

Q. At that time did you take a history from the man? A. I did.

Q. Please state what history you obtained and the result of your examination. A. He stated that he had no serious illness or injury previous

to his military service; that he had no injury or illness during his military service; that he was discharged in good physical condition; began working shortly after but after a few months became nervous,—couldn't endure noise and excitement, became weak and trembled under such conditions, and as I recall at that time I diagnosed it mild neurasthenia. 607

Q. What is mild neurasthenia, Doctor? A. Mild neurasthenia is a functional nervous condition wherein the patients are not able to—well; it is characterized by weakness, irritability and marked fatigability; they tire quickly, under stress. There are many symptoms that may occur; insomnia, indigestion, and possible attacks of trembling; weakness. 608

Q. Could a person with mild neurasthenia work with reasonable regularity at any occupation? A. Yes.

Q. Would such work injure his health or endanger him in any way, Doctor? A. No.

Q. Did you examine him at any other time? A. I examined him several times subsequently. 609

Q. Do you have records of those examinations, Doctor? A. Yes, I have.

Q. If you cannot testify from memory, you may consult them to refresh your memory and tell the history obtained, the examination and your diagnosis. A. The first examination was April 3, 1924; the diagnosis was Psychoneurosis, qualified—mild neurasthenia. The second was Jan. 14, 1925; I had the same history given and the diagnosis was the same—neurasthenia. I say

610 the same history except he stated that in 1924 he became so nervous that he quit for three months; then began working and had continued up to the time of the examination.

Q. When was that examination? A. Jan. 14, 1925. The next examination was Jan. 29, 1926. At that time we had the previous history repeated, with this addition: "worked in the railroad car shop past three years but had to lay off two or three months each year." The next examination was April 19, '28, at which time the diagnosis was severe neurasthenia and severe hysteria. The history at that time showed that between 1926 and '7 he developed attacks of unconsciousness which were considered to be hysterical from his description.

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Q. And the date that he began developing them —from whom did you obtain that, Doctor? A. From Mr. Lumbra. Jan. 17, 1929, was the next examination. At that time he stated that following hard work or excitement or headache, he developed unconscious periods lasting twenty minutes. He knew when they were coming on, and following the attacks was obscure for forty-eight hours afterwards. I might say that "obscure" in this sense means his head did not feel quite clear for the following forty-eight hours. The diagnosis at that time was the same, as previously, severe hysteria and severe neurasthenia. July 8, 1930, he was again examined. The diagnosis at that time was a pronounced psychoneurosis, indicating that his condition was more severe than previously; a mixed neurasthenia and hysteria,

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with a notation:—"change in character and the spasms suggest that he is developing grand mal epilepsy; observation is necessary to determine." 613

Q. When was that Doctor? A. That was July 8, 1930.

Q. At each of these several examinations did you obtain a history from Mr. Lumbra? A. Yes.

Q. Did you inquire into his war service as to whether or not he was wounded or received an injury? A. I did.

Q. And what was his statement on each of these occasions? A. He stated that he had no illness or injury in service. 614

Q. Now, Doctor, when you first examined him in 1924, it was mild neurasthenia? That was your diagnosis? A. Yes.

Q. And that subsequent examinations indicated that his trouble was growing progressively worse, is that correct? A. It was.

Q. Up until 1926 when he told you he was having these convulsive seizures, was there any reason why he couldn't have worked with reasonable regularity at some occupation, Doctor? 615
A. I think he could.

Mr. FitzGerald: That is all.

CROSS EXAMINATION by Mr. McNamara:

Q. He couldn't work full time, could he? A. At light occupation I think he probably could.

Q. Light occupation as a laborer, or do you mean if he was qualified to do some type of light work sitting at a desk? A. I mean some light occupation that did not require some severe physical or mental exertion.

616 Q. That type of occupation would require some education, would it not? A. Not necessarily.

Q. Isn't that generally so, light work in a sitting position? A. It has been spoken of such as attending a gasolene station; that does not require any great education.

Q. Now, in 1924, Doctor, when you examined him at that time, did you consider that his trouble was a functional one? A. Yes.

617 Q. And did you know just what functional disturbance it was? A. Well, the function of the nerves.

Q. And whether spinal or brain causation could you tell at that time? A. There were no symptoms that indicated there was a spinal injury or a brain injury.

Q. Could there have been a brain injury without your being able to find it? A. There could have been.

618 Q. And the fact this has developed as your examination shows it has, until now you find in 1930, which I think was the last examination you quoted from there, that grand mal epilepsy was developing, the fact there was this development all the way through the period of your examinations, would you say from that that there was a probable brain functional injury which caused this in the beginning? A. Grand mal epilepsy is not considered a functional disease.

Q. Well, hysterical convulsions are a result of a functional disease, aren't they? A. They're considered functional, yes.

Q. That might be from a brain lesion of some sort, or any type of brain injury? A. The hysterical you refer to? 619

Q. Yes. A. Yes.

Q. That can be a progressive thing, can it not, too, Doctor? A. Yes.

Q. Could a person suffer a slight concussion with a slight fissure caused in the brain, even so small the X-ray would not show it, that might not show any serious disability for sometime and might develop into this sort of result you have found in this case? A. Please say whether you 620 mean epilepsy or hysteria.

Q. There seems to be some question which it is, doesn't there, Doctor, in this case? A. No, in my opinion he had neuresthenia progressive, which became worse, developed a hysterical condition in conjunction with it, and later developed epilepsy.

Q. Whether it is epilepsy or hysteria, the convulsion I mean, couldn't it reasonably be the result just as I have pictured, of a concussion which may have caused a slight fissure or lesion 621 to the brain cortex or some part of the brain, that did not develop into the hysterial type for some years? Isn't that a probable result of concussion? A. Well, the hysterical condition is functional and might or might not develop from a brain injury.

Q. What function is it? What organic function is it that is the result of? A. You are asking a question no one has ever decided yet.

Q. Is it brain or nerve? A. It is the general nervous system; the brain is included.

622 Q. Isn't it consistent with concussion caused by being thrown by the explosion that might cause the concussion at that time and develop slowly up to this point we now see it? A. It might.

Q. It is all very probable, isn't it? A. I wouldn't say it is very probable; it isn't improbable.

Q. A man might undergo that type of injury and not know he was injured, might he not, Doctor? A. Yes.

623 Q. So that in making his report to you when asked the history of this case, if he had an injury in the army, he would be perfectly honest in saying he didn't have an injury and still have had a brain concussion at that time, couldn't he? A. Not in the terms he used with me when I asked him directly if he had an injury—he said he did not.

Q. Well, he could have had the brain injury and still not know it? A. I shouldn't expect he would have an injury sufficiently severe to injure
624 his brain without having some knowledge of it.

Q. You know, Doctor, there were a great many men thrown to the ground from the concussion of high explosive shells during the war, who got up and went on apparently all right for sometime after, before there was any noticeable change in their condition? A. Yes.

Q. Then something come on which has been called under the general heading of shell shock since then, isn't that so? A. Yes.

Q. Those men at the time they were thrown to

the ground with that concussion, for sometime thereafter until the mental breakdown, they didn't know they had an injury, did they? A. Not unless they were told it. 625

Q. Then a man in the case of Lumbra here, that underwent such a throwing and concussion as has been indicated by the testimony here, could be perfectly honest in saying he did not receive an injury at that time, couldn't he? That is, he would have no way of knowing he received that until it developed and showed later,—isn't that probably correct? A. That is possible. 626

Q. From the time this was in its mildest stage, so far as the history of it was shown to you, it brought about loss of time at the type of work he was trying to do, didn't it, Doctor? A. He so stated.

Q. Is that the logical thing to expect? A. Yes; it might be.

RE-DIRECT EXAMINATION by Mr. Fitz-Gerald:

Q. These men who received severe injuries which have been termed as shell shock, they knew they got those injuries, didn't they? They knew they were knocked down? A. From what I have learned from examining claimants, some did and some did not, until they were told by their comrades. 627

Q. I mean if it resulted in some serious injury, Doctor, and you were to ask them the question if they received an injury, this would have been so pronounced as to have been in their mind, would it not? A. I should expect that it would.

628 DR. J. C. O'NEIL, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. Please state your name and address and occupation. A. James C. O'Neil, Waterbury, physician at the State Hospital.

Q. State your medical education and training, Doctor. A. Graduated from the University of Vermont, 1917; I have been at the State Hospi-
629 tal ever since.

Q. Specializing in? A. Mental and nervous diseases.

Q. Have you ever had occasion to examine Newton W. Lumbra? A. I did.

Q. State the time of that examination? A. August 22, 1927.

Q. Did you take a history from him at that time? A. I did.

Q. Please state the history you obtained, your examination and diagnosis, Doctor. A. He
630 stated he never had had any illness previous to the army service except the usual diseases of childhood. He said he had no illness while in the service and no injury except a fractured ankle and slight gassing for which he was not hospitalized. He gave a history of nervous attacks—said he felt nervous from the time practically he left the army and that for three years he had been getting Government compensation on a diagnosis of neurasthenia, and that sometime within the year previous to the time I saw him he began

to have some sort of fits; these came on rather 631
infrequently, and that for nine weeks previous to the time I examined him, he had not been working. I made a diagnosis of psychoneurosis, hysterical type, or hysteria, you can call it, of a severe degree I believe I called it at that time.

Q. And when did he tell you, Doctor, those convulsive seizures began? A. About a year previous to the time I saw him.

Q. That was when? A. August 22, 1927.

Q. May alcohol bring on such seizures, epileptiform seizures? A. Epileptiform seizures— 632
it may.

Q. At the time you saw Mr. Lumbra, Doctor, from his history, was there any reason why he couldn't work at some occupation with reasonable regularity at least up until the time he began having those seizures? A. You are asking my opinion?

Q. Yes. A. I don't know as that is worth much. His own statement—(interrupted)

The Court: The jury will tell us about 633
that.

A. (Continued) his own statement to me was he had worked practically all the time up to that time.

Q. That is, from the medical history, was there any reason why he couldn't work, in your opinion, with reasonable regularity at some occupation, without injuring his health, up until the time he began having those seizures? A. I don't think there was such a reason.

Q. You mean he could have worked? A. He could have worked.

634 Q. After he began having these seizures, Doctor, was there any occupation at all that he might do, might follow, without endangering his health? A. I think there was.

Mr. FitzGerald: That is all.

CROSS EXAMINATION by Mr. McNamara:

Q. Whether or not he could do that steadily enough to gain a livelihood, you don't know, do you, Doctor? A. If my idea of his condition is correct, and I have no reason to doubt it, whether
635 or not he could work would depend largely on the circumstances in which he worked.

Q. Well, assuming a man of his limited education, whose only training had been that of a common laborer, is it probable that type of man could go on and work with sufficient regularity and could get the work to do, with these seizures?

The Court: Isn't that a question for the jury?

Q. You had a history, Doctor, in this case of nervous trouble from the time he left service?
636 A. I think that is as he stated it.

Q. And that was progressive, increased in frequency and intensity? A. I don't know as to that; he didn't go into any great detail as to how it affected him the first time he noticed it, and my opinion is based largely on his condition as I saw him then.

Q. In your judgment had he been subject to some nervous disturbance for a number of years prior to the time you saw him? A. He gave me a history of such.

Q. You were basing it on the history? A. Practically entirely. I had never seen him before. 637

Q. You couldn't tell from an examination at that time without the history? A. No.

Mr. McNamara: That is all.

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FRANK LAVALLA, called as a witness by the defendant, being duly sworn, testified as follows: 638

Direct Examination by Mr. FitzGerald:

Mr. FitzGerald: If the Court please, may the Doctors be excused?

The Court: Yes.

Q. Please state your name and address. A. Frank Lavalla, Montgomery Center, Vermont.

Q. How long have you resided in Montgomery Center? A. Forty years.

Q. Do you know Newton Lumbra? A. Yes, sir. 639

Q. Did you know him before the war? A. Yes, sir.

Q. Did you know him after the war? A. Yes, sir.

Q. Did you see him shortly after he returned from the army? A. Soon after.

Q. Was there any difference in his appearance before he went away? A. No, sir.

Mr. McNamara: I object.

Q. Was there any difference in his carriage

640 or his activity from the time he came back as compared to the time before he went away? A. No, sir.

Q. Do you know whether or not he worked regularly before the war?

Mr. Sylvester: I object to that.

The Court: He may tell what he saw of his work.

Q. Did you ever see Mr. Lumbra work before the war? A. No, sir.

Q. Did you ever see him work after the war?

641 A. No, sir.

Q. During the time of 1919 to 1921, did you have an opportunity to know him pretty well? A. Yes, sir.

Q. Did he ever complain to you of being sick? A. Yes, sir.

Q. Did he tell you the cause of his sickness or did you know the cause of his sickness? A. Well —(pause).

The Court: He is not a professional. He can tell the complaint that was made.

642 Q. Withdrawn.

Q. Did you ever see Mr. Lumbra drunk? A. Yes, sir.

Mr. Sylvester: We object to that.

The Court: On your promise that you would connect that with his loafing—

Mr. FitzGerald: I am going to with this witness.

Q. Where was he living at that time? A. With me.

Q. Did he have a position or job at that time? A. No.

Q. Was he able to work the next day? A. No. 643

Mr. FitzGerald: That is all.

CROSS EXAMINATION by Mr. McNamara:

Q. You said he didn't have any job at that time?

The Court: That is just what he said. Do you expect to improve that any?

Mr. McNamara: I would like to examine this witness, if I may. This is cross examination.

The Court: All right; go on. 644

Mr. McNamara: The attorney says he couldn't work because he was intoxicated. Now he says this man saw him drunk and at the time he saw him drunk, he didn't have a job. He hasn't come up to his job.

RE-DIRECT EXAMINATION by Mr. FitzGerald:

Q. Have you ever seen him drunk when he did have a job? A. No.

Q. Did he ever work when he lived with you? 645

The Court: That isn't admissible.

Mr. FitzGerald: As to whether or not he ever worked, isn't it possible to help refresh a witness' memory?

The Court: He doesn't need any refreshing his memory.

*Mrs. A. Chapel, for Deft., Direct.*

646 MRS. ADA CHAPEL, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Fitzgerald:

Q. Please state your name, address and occupation? A. Mrs. George Chapel, Montgomery Center, Vermont, occupation housework.

Q. How long have you lived in Montgomery Center? A. All my life.

647 Q. Do you know Newton Lumbra? A. I did.

Q. Did you know him before the war? A. I did.

Q. And afterward? A. Yes.

Q. Did you see him shortly after his return? A. The day he landed; the day he came.

Q. Did you notice any change in his appearance when he returned as compared to his appearance before the war? A. No, I did not.

Q. Was he slower or more active or any different in his carriage or movements? A. I did

648 n't see any change.

Mr. McNamara: Objected to.

The Court: It is allowed.

Mr. McNamara: Exception.

Q. During 1919 and '21 did you have much opportunity to observe him? Did you have much chance to see him? A. Yes.

Q. How frequently did you see him? A. From 1919 to '21, every day; I see him every day.

Q. Did he ever make any complaints to you

of dizziness, weak spells or convulsive seizures? A. No, he never did.

Mr. McNamara: We object to that.

The Court: That isn't admissible; the fact he didn't make complaints to anybody isn't evidence of the fact.

Q. Do you know whether or not he worked at any place during 1919 or '21? A. I can't say I don't know.

Q. You don't know whether he worked or not? A. He worked but I cannot say where or saw him work.

Q. You do know he had a position?

The Court: Let her testify.

Q. Do you know whether or not he had a position during that time? A. From what year did you say?

Q. From 1919 to '21? A. Why, unless it would be at the Nelson Hall Co. at that time.

Q. Do you know whether or not he worked at the Nelson Hall Co.? A. Yes.

Q. Do you know when he was working at the Nelson Hall Co.? A. Why, at the time he married when he was living with my sister.

Q. Do you know how long he worked there? A. No, I cannot tell you.

Mr. McNamara: No cross examination.

*Capt. J. B. Wood, for Deft., Direct.*

652 CAPT. JACK B. WOOD, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. Please state your name, address and occupation. A. Jack B. Wood, St. Albans, Vermont, Treasurer of the Central Vermont Railway, Inc.

Q. Were you in the service during the war, Captain? A. Yes, sir.

653 Q. What outfit were you with, Captain? A. I was with the 103rd Machine Gun Battalion.

Q. That is the 26th Division? A. The 26th Division.

Q. Did you ever have the command of B Company? A. I did.

Q. And you were in action with the 26th, were you? A. I was.

Q. And have you been under fire? A. I have been.

Q. Captain, what size crater would a 157
654 make in ordinary soil—sandy soil? A. Oh, my recollection is that it would be—

The Court: How is this material?

Mr. FitzGerald: There was testimony here as to the size of the crater of this shell supposed to have caused this damage.

The Court: Are you going to give an opinion it wasn't that size?

Mr. FitzGerald: Here's a witness who saw shells all over France—

The Court: Quite likely, but is his opinion admissible tending to show the particular one was not such and such a size? 655

Mr. FitzGerald: There wasn't any particular testimony as to any particular shell hole. Mr. Bell told the story of the war yesterday, he went in one direction and believed Mr. Lumbra went in another.

The Court: The soldier boys told what the shells did there. They said the holes in the ground were made at the time; they didn't see any particular shell make it. 656

Mr. FitzGerald: The Captain was on that front in command of one of the units; he saw holes made at that time.

The Court: But not this particular shell or this particular hole.

By the Court:

Q. Did you see this locality at the time he was injured? A. I don't remember that he was injured, or don't remember Lumbra but I was in on that front then within a very short distance of it—I would say within a kilometer of it: within approximately a mile. 657

Mr. FitzGerald: Is he permitted to answer that question?

Mr. McNamara: It is entirely immaterial.

The Court: You are right and you may have an exception. If it can have the least force and effect in aiding this jury in deciding whether this soldier is totally in-

658 capacitated is beyond my comprehension, but go ahead. I am opening this to give you great latitude.

Q. Withdrawn.

The Court: That is a very sensible thing to do.

Q. Of what Company were you in charge at the time that the organization was demobolized? A. Company B, 103rd Machine Gun Battalion.

Q. Is that your signature, Captain (indicating)? A. That is.

659 Q. And is that (indicating)? A. That is my signature.

Mr. FitzGerald: I wish to offer these (handing papers to attorney for plaintiff).

Q. Captain, in B Company of the 103rd was there anybody on Permanent K. P. because of physical disability? A. Well, I can answer that question if I may—

Mr. Sylvester: We object to it. I don't see how it affects this claimant whether anyone else was or not.

660 Mr. FitzGerald: I said was anyone?

Mr. Sylvester: Or anyone. I object on the ground it is immaterial whether any other soldier or soldiers was on K. P. duty.

The Court: What is K. P.?

Mr. FitzGerald: Kitchen police.

The Court: On a particular day?

Mr. Sylvester: He hasn't stated in his question.

By the Court:

Q. Were you there in the kitchen so you know

who was there? A. Your Honor, if I may say 661
permanent—

Q. Were you there to see who was on kitchen police in that particular kitchen? A. The Company Commander assigns the men who go on to kitchen police each day.

Q. Were you there to see who was working in the kitchen? A. Yes, sir.

The Court: All right, you may ask him if this man was.

Mr. FitzGerald: If the Court please, I don't think it at all material. It is the 662
reason for him being there,—that is the reason for it being material.

The Court: I thought you were going to prove he wasn't there.

Mr. FitzGerald: No, your Honor. He was the Company Commander then.

By Mr. FitzGerald:

Q. When were you Company Commander? A. My recollection is I assumed command of B Company in the latter part of January or February, 1919. 663

Q. You were in command until when? A. Until the organization was disbanded.

The Court: That is after this boy says he was in the kitchen to work.

Mr. FitzGerald: He was still on it on his testimony.

Q. Do you know whether or not he was and the reason for him being?

The Court: No, this man didn't send him there.

664 Mr. FitzGerald: This man said he was on account of physical disability and I think we have reason to show he was not by the man who could have taken him from there. I say the Captain knows the reason he was there, and I want him to state to the jury—

The Court: The Captain did not send him there.

Mr. FitzGerald: No, but he said he knew the reason for him being there and
665 could have taken him away from there.

The Court: Go on.

Q. Do you know whether or not he was on K. P. and the reason for him being there? A. When I took command of the Company Lumbra was on K. P. due to the fact that he had been on there for a considerable time and—(interrupted).

By the Court:

Q. How do you know that? A. From the service records, sir.

666 A. (Continued) and he was an efficient man in the kitchen and the cooks wanted him.

By Mr. FitzGerald:

Q. And that is why you kept him there? A. That is why I kept him there.

Mr. Sylvester: We ask that be stricken out.

The Court: No, let's leave it in. The Government wanted him there because he was a good workman.

Mr. FitzGerald: The Captain kept him there for the benefit of his organization.

The Court: That wouldn't be any reason why he shouldn't have his insurance, if he was totally incapacitated. 667

Witness: May I go on?

The Court: I don't know.

Q. Captain, when you signed this physical report, did you ask the man as to his condition? A. Yes.

Q. You reported no disability at that time (referring to Def. B)? A. Yes.

The Court: What is that?

Mr. FitzGerald: His service record, kept right from the time he entered the service until he was discharged. 668

The Court: That shows at the time of discharge, he said he was all right and wanted to get out of the army and go home?

Witness: Yes, sir.

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GEORGE P. BERRYMAN, called as a witness by the defendant, being duly sworn, testified as follows: 669

Direct Examination by Mr. Hession:

Q. Just state your name and address? A. Geo. P. Berryman, Paymaster of the Central Vermont Railway, St. Albans.

Q. As such have you custody of the records of the Central Vermont Railroad, the payrolls? A. I have them, yes, for a time;—after which they're filed.

670 Q. And under summons of this Court have you brought them here? A. Yes.

Q. And you have those records with you now? A. Yes.

Q. Those pertinent to the case of this Newton Lambra we have been talking about? A. Yes, sir.

Q. Will you refer to those records and tell us when he first went to work?

The Court: We had a man on the stand who told us all about when he went to work
671 and what time he lost, the percentage. Are you going to change what that other man said?

Mr. Hession: I wasn't here. I don't know what he testified to.

The Court: The man testified when he worked and the percentage of time lost.

Mr. Hession: We have the original records which is the best evidence on the subject.

Q. When did he go to work there? A. July
672 12, 1922.

Q. Now at about that time did he make an application for employment and have you that application with you? A. I have the application here.

Q. What is the date of it? A. Dated July 12, 1922.

Q. Refer to that application and tell us what it states?

Mr. McNamara: I object to that.

The Court: No, we don't want to take the time to listen to all that.

*H. P. Berryman, for Deft., Direct.*

Q. Will you read on that this question (interrupted)? 673

The Court: You take it and read it yourself.

Mr. Hession: I thought there might be some question whether it is admissible?

Mr. McNamara: I think there is; we haven't seen that paper.

Mr. Hession: This is an application giving his name and address; Have you any physical defect such as deafness or shortness of breath rendering you unfit for employment on the railroad? The answer is "none." That is dated July 12, 1922, and on the back is condition on admission to the service, the applicants for position in the shop service must be over 16 and under 50 years of age. 674

The Court: We won't put that in.

Mr. Hession: I insist on reading this sentence: It is signed by him, certifying he read that and agreed to it. That makes it admissible, I take it. Applicants for position in shop service must be over 16 and under 50 years of age; they must be able to read and write; be free from all bodily complaints and of a strong constitution. I, the undersigned, have read and hereby agree to the above conditions. Signed by Newton W. Lumbra, and witnessed by Wm. R. Sampson. The objection I understood was to the document. 675

The Court: The objection was overruled.

676 Q. At sometime did he leave the employment there? A. Yes, sir.

Q. And when?

The Court: You have been all over that.

Mr. Hession: It is the same question again. He made another application. He made two further applications for employment and these are the ones I am anxious to get in.

Q. Have you further applications for employ-
677 ment in those records? A. February 20, 1924. This application is dated February 12, 1924.

Q. May I have those two? A. And the other one December 15, 1924.

By the Court:

Q. Did he sign the same kind of a statement? A. Yes.

Mr. Hession: On the question: "Have you any physical defects such as deafness
678 or shortness of breath, rendering you unfit for employment on the railroad?" the answer is "No." That is December, 1924; and the same statement on the back, that he had read the profession that he was free from all bodily complaints and of a strong constitution; and the same statement on February 18, 1924, answering "no physical defects," with the certification he had no bodily ailments, with this additional proviso: "Have you ever been in the service before, if so, state reason for

leaving it." Says: "Left the service on 679
my own accord," and on the statement of December 1924: "Have you ever been in the service before?" stated: "Resigned on own accord." Now perhaps I can shorten it by looking through some of these.

By Mr. Hession:

Q. Have you his total earnings during the period of his employment? A. Yes, sir.

Q. And that employment began in 1922? A. 1922.

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Q. Will you tell us what his earnings were for that year? A. Began in July 1922, the total earnings for the year $510.45.

Q. That was through December 31st? A. Yes, sir.

Q. Now the next year? A. 1923 from January to the latter part of May $464.92.

Q. That is all he worked there that year? A. That is all he worked that year.

Q. Is the reason for his leaving on the records? A. "May 1924 resigned own accord May 681
12, 1924."

Q. '23 I think the date is. A. I beg pardon—"May 1923, May 16, 1923 reduction in staff."

Q. And again after his re-employment, will you give the date of it and his earnings? A. 1924, February 18 re-employed, and worked in the last week in February up to September 5, 1924 when he resigned. The earnings in that period $304.-86 for that year.

Q. Was that continuous employment there? A. I beg pardon—there was also two weeks he

682 worked in December that went into that total. The employment is not continuous in '24.

Q. When does it break off in '24? A. The middle of May until I can give you the dates here (indicating other paper) from May 12, resigned; August 5, 1924 re-employed; September 5, 1924 resigned; December 12, 1924 re-employed in the freight yard.

Q. So that wage was from February to May; August and September and sometime in December, is that correct? A. Yes, sir.

683 Q. And 1925?

By the Court:

Q. Did he work in January '25? A. Yes, all of January practically; the record shows continuous work every week in 1925 except —

Q. Did it show he worked every day? A. This record doesn't.

Q. You have made a record here that showed he did. Did you make that record showing the percentage of time he worked and didn't work?

684 A. No, sir.

Q. Didn't someone in your office? A. No.

Q. Did you hear Mr. Noell testify this forenoon? A. No, sir.

By Mr. Hession:

Q. Is all your testimony from the actual records? A. Yes. Yes, that is all I can go by.

Q. Does the record show continuous employment in the year 1925? A. I would have to go through each payroll, day by day, to get that.

Every week except the second in August he was on the payroll. 685

By the Court:

Q. You don't mean by that he worked every day of the week? A. No, I couldn't say that from this record.

The Court: Do these records show how much of the week he worked?

Mr. Hession: Yes, they do and I think it is rather necessary they be read in.

Q. Does that card show you what he worked each week in January? A. I have the record here which does. This card is the summary of the original records. 686

Q. Does it show how much of each week he worked? A. It showed how much pay he drew for each week.

The Court: One of your men here this morning had it all put up in percentages for each month, which makes it much clearer, I think.

Mr. Hession: I think the records here will show how many hours he worked a day. 687

Mr. Sylvester: The records Mr. Noell testified from this morning were taken from those records there. There cannot be any material difference.

Mr. McNamara: The Government was furnished with an hourly record and the day record of this man's entire time.

Mr. Hession: We haven't an hourly record.

688 Mr. McNamara: We have one.

Mr. Hession: I think we have a right to put them in. These are the best records.

The Court: We will start in at nine o'clock tomorrow morning and you may take all day to put them in if you wish.

Mr. Hession: I don't care to take all day.

(Adjourned at 5:15 p. m.)

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689

(Wednesday, April 20, 1932, 9 a. m.)

GEORGE P. BERRYMAN, re-called:

Direct Examination by Mr. Hession (continued):

Q. Mr. Berryman, referring to your records, will you tell when this man first became employed for the railroad? A. July 12, 1922.

690 Q. And when that employment terminated? A. May 16, 1923.

Q. And the reason? A. Reduction in staff.

Q. And when he was employed again? A. February 18, 1924.

Q. And when that was terminated? A. May 12, 1924.

Q. And the reason? A. Resigned own accord.

Q. And when he again became employed? A. August 5, 1924.

Q. And the length of that employment? A. 691
Resigned September 5, 1924.

Q. And when again he became employed? A. December 12, 1924.

Q. And when was the first termination of that employment beginning December 12, 1924? A. August 23, 1926, granted six month leave of absence.

Q. So during the year 1925 he was with the railroad the entire year? A. Yes, sir.

Q. Now will you refer to the payrolls for the year 1925. Now on those payrolls is the time a 692
man actually punched, himself, going to work and leaving work, shown? A. These payrolls—clock sheets, taken from time clocks, and the time is punched in and out in the morning, and in and out in the afternoon by the man himself.

Q. Now beginning with the first week in January, will you tell us how much time, if any, was lost that week, and then go right through the year that way? A. This week begins December 28, 1924 and ends January 3, 1925. Just what do you want on that, the number of hours? 693

Q. The time lost. A. The time lost—January 1st, which is a holiday and the men didn't work on that day; no time lost aside from the holiday.

Q. By the way, what time did he go to work in the morning, from that time sheet? A. Seven o'clock; the time is punched in at seven o'clock the first time,—6:46 and 6:50. The time starts from seven o'clock.

Q. When did it end the day's work? A. At

694 four in the afternoon except on Saturday when it ended at noon.

Q. That is an eight hour day? A. That is an eight hour day except Saturday.

Q. Now take the next week and go right through? A. The week ending January 10, no time lost, on the 5th, 6th, 7th, 8th, 9th or 10th, no time lost.

Mr. McNamara: We will concede from the testimony already introduced there's no time lost in the month of January.

695 Mr. Hession: You concede that for the entire month of January there was no time lost. All right, we will start February.

A. (continued) no time lost in that week.

Q. That is the first week of February? A. The first week ending February 7th and worked full eight hours Saturday. No time lost on the week ending February 14th; they worked half a day Saturday. No time lost on week ending February 21; they worked a full day Saturday. February 22nd was Sunday and the 23rd was a holi-
696 day, no time worked on that day.

Q. By that you mean the department was closed? A. The department was closed except for certain essential men had to be there. On February 27 worked from 6:50 in the morning until 12 noon; half a day lost there. February 28th worked--Saturday, worked a full day. That concludes February.

Q. Yes,—now March? A. The week ending March 7; no time lost; and the week ending March 14 started work at noon,—worked from one

to four; didn't work in the morning. No time lost the rest of that week. In the week ending March 21 didn't work on March 18 and 19; full time the rest of the week. Week ending March 28 didn't work March 24, 25, 26, 27 or 28. The 29th was Sunday. Didn't work March 30, 31, April 1st; worked full time April 2nd, 3rd and 4th. Week ending April 11 worked full time. Week ending April 18 worked full time. The week ending April 25, on the 22nd he quit work at 3:20, which was forty minutes before closing time; the rest of the week full time. Week ending May 2nd, on May 1st he worked—was ten minutes late in the morning and worked until noon; didn't work in the afternoon. May 2nd worked full time. The week of May 9th didn't work on the 4th or 5th, and on May 8th lost a quarter of an hour because he punched out before four o'clock—3:59. On the week of May 16th was twenty-five minutes late in the morning and punched in at 7:25;—worked full time the rest of the day. On May 15th again punched out a minute ahead of time and lost a quarter of an hour for that reason. May 16th full time. The week ending May 23rd didn't work on May 18th, full time the rest of the week. The week ending May 30th worked full time that week. May 30th was a holiday and there was no work in the shop. The week ending June 6th worked full time. The week ending June 13th didn't work on Saturday, June 13th. The week ending June 20th didn't come in to work June 15th until noon,—worked from one to four; the rest of the week full time.

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700 The week ending June 27th full time. Week ending July 4th worked full time except July 4 when the shop was closed. The week ending July 11th worked full time. The week ending July 18th didn't work July 16, 17 or 18. The week ending July 25th, no time shown in that entire week.

Q. Does that mean he was off entirely that week? A. No; he—his name was carried on this clock sheet but he was transferred to what they call "Italy Yard" at St. Albans, a car inspection point.

701 Q. That was a different place from the building where he had been working? A. Yes, he worked outside from July 22 to September 4.

Q. Did he have to punch the clock then? A. No; that is a different department. I haven't the time sheets for that month; they're in a different department and I evidently did not get hold of them. I can tell you the amount of wages he earned in that period. The week ending July 22 $11.28; July 29 $26.32; the first week in August $22.56; the second week in August he didn't earn
702 any time; the third week in August $26.32; the fourth week in August $26.32 and the fifth period in August $23.50.

Q. Does it show what his hourly rate was; how much did he get an hour? A. In 1925, July 20, 1925 employed as car man helper at Italy Yard 47 cents an hour, and September 5th he was back to 35 cents an hour. The week ending September 12th he was back in the shop, worked a half a day on September 8th, and he worked in the afternoon of September 8th and worked the

morning of September 11th; worked full time September 9 and 10 and full time September 12. The week ending September 19 he worked full time all week. September 26—no time shown for September 26; full time all the other days. The week ending October 3rd full time. The week ending October 10th full time. The week ending October 17th, punched in at 7:28 in the morning and thereby lost half an hour; the rest of the week full time. The week ending October 24th full time. The week ending October 31st full time. The week ending November 7th full time. The week ending November 14th did not work on November 11th,—shop closed. 703 704

Q. The entire shop was closed you say? A. The entire shop was closed Armistice Day. He worked full time the rest of that week. The week ending November 21st punched in at 7:53 on November 20th and lost one hour; full time the balance of the week. The week ending November 28th the shop was closed on November 26th, evidently Thanksgiving Day; worked full time the balance of that week. The week ending December 5th did not work December 2nd; came in at noon and worked until four o'clock December 3rd,—one o'clock to four; worked full time the balance of that week. December 12th, on December 12th came in at 7:24 A. M.—lost half an hour; worked full time the rest of that week. The week ending December 19th worked full time. The week ending December 26th, December 25th the shops were closed; worked full time the rest of that week. The balance of that year would be in 1926—the other few days. 705

*G. P. Berryman, re-called for Deft., Cross.*

706 Q. That is for the year 1925 you have just read the records? A. For the year 1925, yes, sir.

Q. Now will you turn again to the documents that you had yesterday and let me have the applications for employment.

Mr. Hession: I want to offer these your Honor.

The Court: Admitted.

Mr. McNamara: May it appear that these are not in the handwriting of the
707 plaintiff. He has signed certain papers but where the questions are answered it is not in the handwriting of the plaintiff.

The Court: If he didn't sign them, it isn't admissible.

Mr. McNamara: We think he did sign them, but where the questions are answered, that is made out by some clerk and he simply signed the paper he was handed to sign.

Mr. Hession: Of course, he is bound
708 by them if he answered them.

The Court: They are evidence against him for what they are worth. They may be worth much and may not be worth anything.

Mr. Hession: That is the way with all evidence, your Honor.

The Court: No, not all.

CROSS EXAMINATION by Mr. McNamara:

Q. Do you know, Mr. Berryman, if records were taken from the sheets which you have had

here and the record that Mr. Noell testified to yesterday was made up from those sheets? A. I—that is the only way I should say they were. I don't know of any other source where he could get them. 709

Q. And these records you have came from Mr. Noell's office? A. Yes, sir.

Mr. McNamara: That is all.

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NEWTON W. LUMBRA, re-called: 710

RE-CROSS EXAMINATION by Mr. FitzGerald:

Q. You filed claim for compensation, Mr. Lumbra? A. Yes, sir.

Q. Is that your signature, sir? A. Yes, sir.

Q. And this (indicating)? A. Yes.

Mr. FitzGerald: The Government would like to offer these your Honor. 711

Mr. McNamara: No objection; they were in before.

The Court: Admitted. (Def. Exs. F and G.)

Q. Mr. Lumbra, as a result of the claim for compensation you filed, you are now drawing about a hundred dollars a month?

Mr. McNamara: We object to that. It is immaterial and inadmissible in every way. That has no bearing on this case, whether or not this man is disabled under

712 the provision of the contract of insurance he had with the United States Government. It isn't any more admissible than if the City of St. Albans was keeping him now or if he had inherited a hundred thousand dollars since then.

Mr. FitzGerald: It is offered to show why he did not work. The compensation began in 1929 and he hasn't worked since then.

The Court: Suppose he was a rich
713 man—would that be admissible to show he was not incapacitated?

Mr. FitzGerald: No, to show why he did not have to work.

The Court: It doesn't necessarily follow because he is a rich man he doesn't work. Usually rich men are rich because they do work.

Mr. FitzGerald: That isn't necessary either, he might have inherited it. This
714 is offered for what it is worth—to show why he has not worked; as a reason why he has not worked.

Mr. McNamara: That is going back to the same type of evidence raised yesterday. We say all possibilities are not evidence. There should be some probability. If they can show this man quit and said the reason he quit was because he got some compensation, or something of that nature, I say yes, but the only evidence is this man attempted to work and has

tried to get all kinds of employment since 715
that time.

Mr. FitzGerald: There isn't any evidence in this case—

Mr. McNamara: We say Dr. Davidson's testimony was he did instruct the railroad this man should not be employed there any more, and thereupon was discharged.

The Court: Because it was unsafe to employ him.

Mr. McNamara: Yes, and we say since 716
then we showed by the City Manager, who was carrying on a big construction project that year and was hiring all sorts of men,—this man came to him and tried to get work but he wouldn't hire him. If this man hadn't worked at all it might have some bearing, but under the facts existing here, we say they're put in to create some prejudice and we say they're immaterial, by reason of prejudice. Anything prejudicial should not be admitted. 717
It has no tendency to prove or disprove any issue in this case.

The Court: The evidence being that he did work a good deal of the time up to the time the railroad Doctor directed the railroad should not employ him. Now you say that because he got compensation, that that is the reason he hasn't worked since then?

Mr. FitzGerald: I say that is evidence

718 of such reason. I don't say it is conclusive at all but it is being offered for the consideration of the jury.

The Court: The most it could do would be to have a tendency to show the man didn't have any motive to work.

Mr. FitzGerald: It wasn't necessary, yes.

Mr. McNamara: Then that is trying to build an inference on an inference, which isn't admissible in any way.

719 The Court: No, that wouldn't be an inference on an inference, would it?

Mr. McNamara: I think it would; drawing the inference because he may have had some compensation, he may have had no motive for work.

The Court: That is the fact, he had compensation. That he's perfectly well and able to work, but since he was discharged, he hasn't worked because the Government gave him compensation.

720 Mr. McNamara: I say there're a double inference being drawn there.

The Court: I cannot follow you on that.

Mr. McNamara: First, that he's able and could have worked, and second, he would not because he had some compensation.

The Court: I don't think that is quite it. The fact he's got some compensation from the Government because he's a soldier,—when did he get this?

*N. W. Lumbra, recalled for Plff., Re cross.*

Mr. FitzGerald: I don't recall the exact date. 721

Mr. McNamara: 1929.

The Court: After he was discharged?

Mr. FitzGerald: Yes, your Honor. Mr. Lumbra can answer that question. I don't recall the exact date.

The Court: Don't the records show?

Mr. FitzGerald: Yes, your Honor.

The Court: Well, gentlemen of the jury, it wouldn't make any difference if the Government have insured the soldiers 722
who paid so much a month for insurance. Now to make it perfectly clear, the Government has also passed a law since the World War that certain soldiers are entitled to a pension, even though they were not injured in the war, and certain other laws that the soldiers who were injured should draw certain compensation; 25 per cent if incapacitated that much; if 10 per cent he gets so much, and so on. It 723
wouldn't make any difference how much compensation a soldier boy might draw, he would still be entitled to his insurance if he has become totally disabled from his service in the war; that is, before his policy lapsed. The fact of the soldier getting compensation has no force or effect on his insurance whatever, but now the Government says here's a policyholder who worked down to 1929, off and on, at different times, as you have heard

724 the evidence here, and that the railroad Doctor in 1929 directed the railroad to discharge him,—it was dangerous for the railroad to have such a man in their employ, and some other evidence is it was dangerous for the man himself. Now I am going to admit this evidence against the plaintiff's objection and exception, as to when and how much compensation he received, but I want to be emphatic to you,—make it clear that the law is if he
725 was getting ten thousand dollars compensation, or whatever sum he was getting as compensation, he is still entitled to his insurance,—however much compensation he is getting,—if he has become totally disabled. There is some likelihood that a person not trained in the law might say "why here's a man that is getting enough any way without his insurance; he's being well used any way." Now that isn't the law. However much compensation he
726 may be getting, he is still entitled to his insurance if he has become totally disabled, because the insurance is something he bought and he paid for. To pay for that insurance the Government deducted a certain amount each month from his pay, and that cannot be done away with by the Government giving a man a pension afterwards or giving him compensation, and there's a great difference between pension and compensation, because

a pension is given, you know, to even 727
widows of old soldiers who are now living,—soldiers in the Civil War. That is a gratuity, given to old soldiers in the Civil War when they got old, whether injured in the war or not, but compensation is given to soldiers in the World War and is given for injuries they received in the war, and with that explanation you may put in your evidence. I want you to make that clear to them in your discussion, Mr. Attorneys for the plaintiff. 728

Mr. FitzGerald: If the Court please, I think there was a mis-statement of what the law is on his right to collect. Your Honor no doubt meant while the policy is in effect, he is entitled to collect if he has become totally disabled.

The Court: From his service in the war.

Mr. FitzGerald: No, he must have been permanently and totally disabled on May 31, 1919, from any cause. If he subsequently became permanently and totally disabled, that would not be sufficient. 729

The Court: No, of course, it would not. If he became totally and permanently disabled while he was in the army,—and he may not have known it then; his doctors may not have known it then.

Mr. FitzGerald: He would know more about his condition than anyone else your Honor.

730 The Court: He might and might not. He doesn t have to discover that he was injured to such an extent that he was in fact permanently and totally disabled before his policy expired. For instance, a man, a soldier goes in the army and he gets tuberculosis while in the army, and he goes on to work, and lives on for a quite a while. Being a slow disease he isn't aware he has tuberculosis; Doctors are not aware of it, but his working after he got tuber-

731 culosis was really suicide, but he didn't know it. So here is a soldier who the Doctors say now has epileptic fits,—that is the lay term;—the public refers to those things as epileptic fits;—it is a pretty good description. Now if he received an injury to his brain from that explosion, that Dr. Skeels has testified he was not aware of for quite a long time, a very long time. He worked and the work he did in-

732 creased the trouble he was having; increased the dizziness and so on and so on, and that the work he did did him harm, then it is for you to say gentlemen, whether he was in fact permanently and totally disabled when his policy expired,—which was about the time he was discharged. The policy expired in this case on the 29th day of May 1919. Now he got home about—

Mr. FitzGerald: April 29th he was dis- 733
charged.

The Court: Yes, and the policy ran thirty days more. He got home in April sometime?

Mr. FitzGerald: Yes, your Honor.

Q. As a result of that claim, you have drawn compensation, Mr. Lumbra? A. When it started you mean?

Q. Yes. A. Yes, 1924.

Q. You have been drawing compensation right along since then? A. Yes. 734

Q. How much are you getting now? A. The rating is 105 a month.

By the Court:

Q. How much did you get? A. I get $94.50 and the oldest daughter by my first wife gets $10.50.

RE-DIRECT EXAMINATION by Mr. McNamara:

Q. You haven't been getting that but a little 735
while? A. Only a little over a year.

Q. From 1924 up to then, how much were you getting? A. When I first got rated I got 10 per cent, and then I got 21 per cent, and 45 per cent and 70 per cent.

Q. Now you are on a hundred per cent basis? A. A hundred per cent basis.

Q. And that is of service origin, is it? You are even rated now as a hundred per cent disabled

736 for compensation, from disability incurred in the Government service? A. Yes.

Q. Tell us how much that ten per cent was, how much a month? A. Around nine or ten dollars a month.

Q. Around nine or ten dollars? A. If it was a permanent rating it would be ten dollars a month.

Q. Do you remember how much the 21 per cent was? A. $19.84.

Q. And the different other rating? A. 45
737 per cent paid $42.50.

Q. When did that start? A. That started when Dr. O'Neil examined me in 1927 and they cut me down once after that to 21 per cent, and raised me back up again in 1929. Then again in the latter part of 1929 or '30, I don't remember they raised me to 70 per cent and gave me $67.00 a month, and then they raised me to a hundred per cent in August 1930.

Mr. FitzGerald: At this time I would like to file a motion for a directed verdict.

738 The Court: Have you any evidence in rebuttal?

Mr. McNamara: No.

The Court: Read it.

Mr. FitzGerald:

*Motion for Directed Verdict.*

"UNITED STATES DISTRICT COURT, 739

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
v. No. 8167
UNITED STATES OF AMERICA

MOTION FOR DIRECTED VERDICT. 740

Now comes the defendant in the above entitled action at the close of all the evidence and moves for a directed verdict in its favor on the ground that upon all the law and the evidence in this case the plaintiff is not entitled to recover for the reason that the plaintiff has not proved he was permanently and totally disabled on or before May 31, 1919; and that the evidence introduced in the case is insufficient 741
to support a finding that the plaintiff was permanently and totally disabled on or before the 31st day of May, 1919.

HARRY B. AMEY,
U. S. Atty. for the
District of Vermont.
By FRANCIS J. FITZGERALD,
Assistant Insurance Attorney."

*Preliminary Charge.*

742 The Court: You make that 31 and I make it the 29th.

Mr. FitzGerald: The war risk insurance was paid for the month and even though he were discharged on the 29th, it would have been paid for the rest of April, and he would have 31 days grace, which would be May 31st.

The Court: I think this is a case to be decided by the jury. It is not for the Court. There's evidence here from which
743 the jury can well find he was permanently and totally disabled on the 31st day of May, 1919, and that being so, it is the plain duty of the Court to submit the case to the jury.

Mr. FitzGerald: Exception.

The Court: Exception, yes.

Mr. FitzGerald: The defendant rests.

(9:52 a. m.)

744 The Court: Before you make your arguments, I am going to charge the jury on the law. I think it will make it plainer and be helpful.

I am going to tell you, gentlemen, how I am going to submit this case to you. It will be very brief. I always make a Charge in writing and give it to the attorneys on each side, and I will use the same Charge I had in the other trial, or just change that May 31 from May 29, and adding one month.

Now there's only one principal question of fact, gentlemen, for you to decide: Was the plaintiff permanently and totally disabled by his services as a soldier in the World War, by injuries to his nervous system from the explosion, when his insurance expired on the 31st day of May, 1919? That is the question for you to decide. Did he go into the war a sound man in health and come out a ruined man in health so that he could not work continuously at a gainful occupation, notwithstanding neither he nor his physicians were aware of his affliction until much later? 745 746

Now you want to know what total disability is, and what permanent disability is, and the higher court, the Circuit Court of Appeals, has told us what permanent disability is within the meaning of this insurance policy. We have spoken of an insurance policy here. The Government did not actually write an insurance policy and give it over to the soldiers as the private Insurance Companies do, but all they did was they put a man's name down as being insured for so much, and deducted so much from his pay, and then the Act of Congress is the policy. That Act of Congress authorizing the insurance is the policy. 747

Now as I say, you want to know what is permanent disability, so the higher courts have told us, and I was very much surprised when they told us what it was. I think you will be very much surprised. A total disability is any im-

748 pairment of health which made it impossible for the insured to follow continuously a substantially gainful occupation. Now that is a short definition and it means a lot. If he was able to follow a gainful occupation only spasmodically and with frequent interruptions due to his disability, he was continuously disabled.

The word "continuously" means with reasonable regularly. It does not preclude periods of disability which are ordinarily incident to ac-
749 tivities of persons in generally sound health. A good test or illustration of total disability is: Has his service in the war, the injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by? I have taken that word for word from a decision of the Circuit Court of Appeals.

If employers won't hire him after they have learned of his actual condition, because of that
750 condition, he is totally disabled within the meaning of the law, notwithstanding he is physically able to do many kinds of manual work.

The Government contends that the plaintiff is physically and mentally able to work at a gainful occupation a large part of the time, but if you find that employers refuse to employ him because he is too frequently sick, or because he is unable to do a good day's work, or because there is danger from such a workman who suddenly

has faint spells, dizzy spells, epileptic fits or con- 751
vulsions, then he is totally disabled.

A total disability is permanent when it is of such a nature that renders it reasonably certain it will continue throughout a person's lifetime.

Now there is the law relating to a soldier's insurance, and the attorneys will discuss this case, and you feel free to ask them any questions as the discussion goes on, if you want to. I should have told you at the commencement of the trial 752
to ask the witnesses any questions, but I forgot it. Now the idea of a trial is to have the Judge and Jury thoroughly understand the case and the law applicable to the case. The jurors should feel free to ask questions. As I said, the question of fact here is for you to decide. The judge hasn't anything to say. It is what you think; not what the Judge or the Attorneys may think about it. The jury should decide it.

Now the testimony, Mr. FitzGerald, that went 753
in relating to his drinking intoxicating liquor—there wasn't any, was there, except his conviction, and that was admitted?

Mr. FitzGerald: I think that is all your Honor.

The Court: Well there wasn't any evidence then that his drinking intoxicating liquor caused his disability, was there?

Mr. FitzGerald: I believe there has been your Honor. The doctors who stated that the

754 excessive use of alcohol may cause this condition. I think it is a question for the jury to determine the worth of it.

The Court: But you haven't any evidence he used it to excess.

Mr. Sylvester: No.

Mr. FitzGerald: He admitted on the stand he was drunk twice, and that is excess, on his own statement. I asked him the question Mr. McNamara asked him if it were not the time when he was ringing the church bell in the steeple, and
755 he said "No, I was talking about another time," so that's two times he admitted on the stand your Honor.

Mr. McNamara: No.

The Court: But you didn't show when either of these occasions were.

Mr. FitzGerald: Mr. McNamara did that; both were after the war, and in Montgomery.

The Court: That isn't fixing it so we could say anything about when it was except it was since 1919.

756 Mr. FitzGerald: That is all, your Honor; between 1919 and 1921.

The Court: Why?

Mr. FitzGerald: Because he left Montgomery Center at that time.

The Court: That doesn't mean he might not have been back there.

Mr. FitzGerald: I believe he answered the question "Have you been back there since" and he said "no."

Mr. McNamara: No; the evidence is he has 757
been back there since.

The Court: It is only a little ways from St. Albans to Montgomery, and he being a Montgomery boy, he would be likely to go back there if he wanted to have a little spree.

Mr. Sylvester: The most any of these doctors testified was that it was possible. They haven't dared say it was probable. Even so, if he had plead guilty twice, that wouldn't be construed as excessive use of alcohol any way.

The Court: I don't think you or your associate 758
was very diligent in not finding out when these occasions were.

Mr. McNamara: If they don't prove it, I don't think it is incumbent upon us to prove it. I don't think it is necessary for us to prove anything for them.

Mr. Sylvester: I don't think it is material and didn't during the trial, and don't now.

The Court: Then I should commend you instead of finding fault with you.

Mr. Sylvester: I think so. 759

The Court: I think you are right about that. I suggested, you know, I would wait for you to give me some law?

Mr. FitzGerald: I think it is clearly established in the testimony, not only in this case, but medical science insofar as what may cause epilepsy, the reasons are so varied that it could be one of many causes. Dr. Skeels, the man who was the only one I believe who expressed a firm conviction,—first he stated that traumatic epilepsy caused by

760 an injury on the head, comes at any time. He also stated he did not believe this man had true epilepsy. Then he stated these nervous spells were something, and he didn't know what.

The Court: What I asked you about was the law, not medical science.

Mr. FitzGerald: The Court will take judicial notice, please, of those facts.

The Court: You don't seem to get my notion. I think the law is clear that the Court should not submit any question such as this is to the jury
761 to decide: Is his disability due to the use of intoxicating liquor,—unless the Government has some evidence tending to show his condition is probably due to it;—or, because there is a possibility, it is not sufficient; that it must be evidence that it probably is; not that it is absolutely certain, but that the probabilities are that his disability is due to his use of intoxicating liquor. Now that is the law, and if you claim it is different, you ought to show me some. I have asked you about it,—asked you to show me the law.

762 Mr. FitzGerald: The only answer I can make to that is that in this particular case the most serious condition Mr. Lumbra may have is epilepsy, and it is conceded by all that the causes of epilepsy are numerous and varied.

The Court: That isn't what I have asked you about. Show me some law to the effect if there is a possibility, that I could let the jury decide that possibility.

Mr. FitzGerald: I think it is a question of fact more than a question of law.

Mr. Sylvester: I don't think there is sufficient 763
evidence that question should even be submitted to the jury.

The Court: If there is a law, you will find it in the books. My books all read as I say. If there's any others that read differently, you ought to tell me about it so I can get them, if you don't care enough about it to bring them to me.

Mr. FitzGerald: These seizures are not a question of law. It is a question for the jury to decide,—did the man get it this way or some other way, and if so, when? 764

Mr. McNamara: The jury doesn't care what he got. It is not material.

The Court: It is a question of fact, but you don't go along with me on the proposition that there can be no question of fact on a mere possibility. It has got to be more than a possibility. It has got to be made probable by evidence; that is the way all my books read.

Mr. FitzGerald: If the Court please, on what theory was the testimony of witnesses as to the man's appearance admitted? There's nothing in the law books on that, is there? How he looked before the war or after the war? 765

The Court: There is no possibility about it. A person see him and said there was a change.

Mr. FitzGerald: It was a question of fact.

The Court: Well, go on with the arguments.

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Mr. Sylvester made the opening argument for the plaintiff at 10:10 a. m.

766 The Court: That is a very poor explanation. If you think he is totally and permanently disabled, you return a verdict for the past monthly payments up to now, but next month the Government will say we won't pay; or six months from now they will say we are going to stop paying, or a year, or ten years, and the soldier, he can sue them again. The country has taken great pains to say on these insurance cases he is entitled to a trial by a jury; we won't take what any doctors say about it, or what any Board or Veterans
767 Bureau may say about it, or what any Judge of the Courts may say about it, but we will take what the jury may say about it in insurance cases.

(Argument resumed by Mr. Sylvester.)

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(10:35 a. m. recess.)

Mr. FitzGerald argues for the defendant, at 10:44 a. m.

* * * * * *

"The witness testified he saw the crater made by the shell that exploded and threw
768 him. He was in the dugout and testified he left for the rear that night; there didn't anybody show that particular crater to him."

* * *

Mr. McNamara: If the Court please, counsel is arguing exactly opposite to the evidence in this case. The witness testified he saw the crater because the boys pointed it out to him. I don't like to interrupt counsel's argument—(interrupted).

The Court: Then I wouldn't, if I were you.

*Arguments.*

Mr. McNamara: (continuing) but if that is left on the record, I wish an exception to it. 769

Mr. FitzGerald: (resuming argument) If, gentlemen at any time I misquote the evidence, I assure you it is entirely unintentional and I know it won't be misleading because your twelve collective minds will readily straighten me out. There is testimony that Mr. Lumbra was in that dugout and that he left for the rear that night and he left there because he was not able to continue. This is a 75 foot dugout, under ground. How far it is from the surface on a slope, we don't know, but there's testimony it was seventy-five feet underground; they don't sink shafts,—there would be a slope. You know how far it would be from the surface on that slope down to that dugout. There must have been steps down to it. How is a man going to hobble out on a sprained ankle to look at a shell hole during a bombardment? 770

* * * * *

(Referring to testimony of Capt. Wood.)

Mr. McNamara: I object to that. The testimony was he never was asked anything about his physical disability. There was no question of that nature put to Capt. Wood. 771

The Court: It is for the jury to say what was said; not for me.

Mr. FitzGerald: (resuming argument) Capt. Wood signed that certificate when he came out of the army, that he knew of no reason why he was not O. K.—well and sound.

* * * * *

772 (Argument closed by Mr. FitzGerald at 11:42.)

Mr. McNamara makes closing argument for the plaintiff at 11:43 a. m.

(Noon.)

The Court: We will go to luncheon I think now and come in at two o'clock, gentlemen.

(Wednesday, April 20, 1932 2 p. m.)

Mr. McNamara resumes closing argument, finishing at 2:35 p. m.

773

## Charge.

The Court: Gentlemen of the jury, there is only one principal question of fact in this case for you to consider and decide: Was the plaintiff permanently and totally disabled by his services as a soldier in the World War,—by injuries to his nervous system from an explosion, when his in-
774 surance expired on the 31st day of May, 1919? Did he go into the War a sound man in health and come out a ruined man in health, so that he could not work continuously at a gainful occupation, notwithstanding neither he nor his physicians were aware of his affliction until much later?

The burden of proof is upon the plaintiff to prove that he was totally and permanently disabled before his insurance expired on the 31st day of May, 1919.

*Charge.*

By burden of proof is meant a preponderance of the evidence, or to state it in other words, a fair balance of the evidence. That is, the scales must tip in the plaintiff's favor in order for him to prove his case as the law requires. This does not mean that he must produce more or even as many witnesses as the defendant, but it means after considering all the direct evidence in the case and all of the probabilities from the direct evidence and all the inferences to be drawn from the direct evidence, that you are more inclined to believe that he was totally and permanently disabled. The way you are more inclined to believe is a true test and the scales always tip in accordance with that belief without regard to the number of witnesses on a side. If the scales just balance or tip in the defendant's favor, then the plaintiff has failed to prove his case as the law requires and he cannot recover. 775 776

As to the credibility of the witnesses and the weight to be given to their testimony, the law is that you are not bound to give the same weight or the same credit or have the same faith in the testimony of each witness, but you should give their testimony just such weight and have just such faith in it as you think it is fairly entitled to receive. Consider their appearance on the stand while testifying;—their feelings or bias,—if any;—their interest in the result of the trial,—if any;—their means of information and the reasonableness of the testimony which they give, and believe as much or as little as you think you ought to. 777

*Charge.*

778 A total disability is any impairment of health which made it impossible for the insured to follow continuously a substantially gainful occupation. The word "total" as applied to disability does not necessarily mean incapacitated to do any work at all. If he was able to follow a gainful occupation only spasmodically and with frequent interruptions due to his disability, he was continuously disabled. The word "continuously" means with reasonable regularity. It does not preclude periods of disability which are ordinarily
779 incident to activities of persons in generally sound health. Most all of us, however good our health is, occasionally, at times we have to lay off for some reason or other.

A good test or illustration of total disability is: Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world
780 go by? A good test,—an accurate illustration of total and permanent disability,—that has been written into the books by the higher Court.

If employers won't hire him after they learn of his actual condition,—because of that condition,—he is totally disabled within the meaning of the law, notwithstanding he is physically able to do many kinds of manual work.

The Government contends that the plaintiff is physically and mentally able to work at a gainful

occupation a large part of the time, but if you find 781
that employers refuse to employ him because he is too frequently sick, because he is unable to do a good day's work, because of the danger from such a workman, a workman who suddenly has faint spells, dizzy spells, epileptic fits or convulsions, then he is totally disabled.

A disability is permanent when it is of such a nature that renders it reasonably certain it will continue throughout a person's lifetime.

782

If you find and decide that the plaintiff was permanently and totally disabled, as defined, on or before his insurance expired on the 31st day of May, 1919, he is entitled to recover the insurance payments due him of $57.50 a month from May 31, 1919 to March 31, 1932, inclusive, 155 months, amounting to eight thousand nine hundred twelve dollars and fifty cents ($8,912.50) and your verdict will be for that amount. He is not entitled to recover any interest.

783

If you fail to find he was totally and permanently disabled, as defined, on or before his insurance expired on the 31st day of May, 1919, he is not entitled to recover anything and your verdict will be that the defendant is not liable.

The Court: Have the attorneys for the plaintiff any exceptions they wish to take to the Charge as given?

Mr. McNamara: No exceptions.

784 The Court: Mr. FitzGerald?

Mr. FitzGerald: Yes, if the Court please, I would like an exception to that part of the Charge which states he would be totally and permanently disabled when neither he nor his physicians knew it. A man would be the best judge of his own condition.

The Court: Have you any law to that effect? I don't want to hear any argument about it.

Mr. FitzGerald: It is the evidence in this case. We object to that point because doctors have testi-
785 fied that men with epilepsy could work without endangering their health.

The Court: One doctor did;—two or three others testified it would.

Mr. FitzGerald: The testimony in here has been by doctors that persons with epilepsy don't endanger their health by working.

The Court: The exception was to what I said "when neither he nor his physicians were aware of his affliction until later." I stated the law as the higher Courts have stated it and unless you
786 have something later?

Mr. FitzGerald: The only statement I wish to make is what I have made. May I have an exception?

The Court: You say because certain doctors testified here that persons who were nervous could work without injuring themselves, that I should not charge the law of the land?

Mr. FitzGerald: I don't think that Charge fits this case, and that is why I am asking for an exception.

The Court: I am asking you,—not what you think about it,—I said the higher Courts have decided that the law is just as I have stated it and unless there's some decision that I haven't seen, —and if you have a decision to that effect, why I will be glad to have you tell me where it is, so I can look at it and correct my Charge. 787

Mr. FitzGerald: If I had a citation on it I would have furnished it to you. I am merely asking an exception on it your Honor.

The Court: You say you haven't any case?

Mr. FitzGerald: Not in hand at this moment. 788

The Court: Very well, take your exception; because if you do know of a case, you should tell me about it so I can change my charge.

Mr. Fitzgerald: I would like an exception also your Honor to that part of the charge—"Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by?" You must find that condition prevailed on or before May 31, 1919; not what may have happened subsequently. 789

The Court: That is taken from the Circuit Court's opinion word for word.

Mr. FitzGerald: I am familiar with that opinion. May I have an exception?

The Court: Certainly. You don't have to get it from me. I haven't anything to say about it.

Mr. FitzGerald: I would like an exception also your Honor to that part of the Charge "If employers won't hire him after they learn of his ac-

790 tual condition"; they must find that condition prevailed in 1919.

The Court: That language is taken from the Circuit Court opinion too, word for word.

Mr. FitzGerald: Exception.

The Court: If you have anything later that changes that, you ought to tell me about it. Have you?

Mr. FitzGerald: I have no citation your Honor.

The Court: You are familiar with the case in which that was held, of course? If employers
791 won't hire him you are familiar with that case, are you not?

Mr. FitzGerald: Yes, it is an epileptic case if I recall, but I believe that man had seizures back at that time.

Mr. McNamara: No, they developed later.

The Court: This is an epileptic case, that is why I put it in there.

Mr. FitzGerald: I would like an exception also your Honor to that part of the charge "If you
792 find that employees refuse to employ him because he is too frequently sick, because he is unable to do a good day's work, because of the danger from such a workman, a workman who suddenly has faint spells, dizzy spells, epileptic fits or convulsions—" we say the jury must find that condition to be as of 1919.

The Court: I am bound by what the higher Courts have said.

Mr. FitzGerald: I want an exception your Honor. There is also an opinion in one of the Circuit Courts which states that even though the

disease had begun and was progressive, unless it had reached a point of total and permanent disability before the date of the expiration of the contract, there could be no recovery. It is admitted this is a progressive disease if it is true epilepsy. 793

The Court: That is just what I have told this jury in starting. You cannot expect me to repeat everything in every paragraph. (First paragraph in Charge read by the Court at this time.)

Mr. FitzGerald: Exception.

(The jury retires at 2:55 p. m.) 794

VERDICT.

In this cause the jury on their oath say that the defendant is liable in manner and form as the plaintiff in his declaration hath alleged and find for the plaintiff to recover from the defendant $57.50 a month from May 31, 1919 to March 31, 1932, inclusive, being 155 months and amounting to the sum of $8,912.50. 795

(Signed) DANIEL M. ST. GEORGE,
(3:53 p. m.) Foreman.

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All of the exhibits mentioned in the foregoing testimony and received in evidence are hereby made a part of this Bill of Exceptions, except such as may be by stipulation omitted from the same.

796 And the defendant prays that this Bill of Exceptions may be allowed, settled and signed.

Settled and allowed this 26th day of July, 1932.

HARLAND B. HOWE,
Judge of the United States District
Court for the District of Vermont.

It is hereby agreed that the above and foregoing may be settled and allowed by the Court as the Bill of Exceptions in said cause.

797 .....
Attorney for Plaintiff.

Endorsed:
Filed July 27, 1932,
A. Myrl Blakely,
Deputy Clerk.

---

## Plaintiff's Exhibit 1.

Apr. 19-1932 K. A. G.

Montgomery Ctr., Vt.
798 Dec. 7, 1920.

This is to certify that I have given medical treatment to Mr. Newton W. Lumbra, of this town, a veteran of the world war, since June 1920, and I find he suffers from *Rheumatism, Chronic Bronchitis and Nervousness.* All three conditions incapacitate Mr. Lumbra to a certain extent from doing his daily tasks. I believe these disabilities were brought on *by exposures to shell-shock,* poison-gas and inclement weather during his war services.

FRANK B. HUNT, M. D.

## Defendant's Exhibit A.

4-19-1932. K. A. G. 799

SCHEME OF REPORTS OF PHYSICAL EXAMINATIONS.

Place St. Albans, Vermont.
Date Dec. 10, 1920.

1. Claimant's name Newton W. Lumbra (C512534.)

2. Service organization and rank July 13, 1917, April 29, 1919, 103 M. G. Bn. Pvt. 800

3. Present address Montgomery Center.

4. Age 28. Color White. Previous occupation Lumberman.

5. Brief military history of claimant's disability: "never sick in Army". Hospital once for sprained ankle in France. Became sick after getting home.

6. Present complaint: Rheumatism, throat trouble, "Husky voice."

7. Physical examination: 801

(General examination desired, but most detailed report of part which is the seat of disability. This report should give in detail all physical findings and in addition laboratory findings of sputum, urine, blood, etc., X-ray, blood pressure, etc., depending on the location of the disability.)

Young adult white male. Head contour normal, eyes, ear nose negative, chronic inflammatory process in larynx. Lungs negative

*Defendant's Exhibit A.*

802 to fercussia & auscultation. Fremitus O. K. No abnormalties in heart sounds noted no murmurs, reduplications or accentuations noted. Abdomen negative Lower extremities negative. Upper extremities negative.

8. Diagnosis: Articular Rheumatism chronic 1039. Lyarngitis chronic 666

9. Prognosis: Good.

10. Is claimant able to resume former occupation? Yes.

11. Do you advise it? Yes.

803 12. Is claimant bedridden? No

13. Is the claimant able to travel? Yes.

14. Do you advise hospital care? No

15. Will claimant accept hospital care? Yes.

16. Is there a reasonable presumption that the applicant has a disability due or traceable to his military service? Yes.

17. What is the degree of his vocational handicap resulting from the disability (major, minor, or negligible; see explanation on reverse)? Negligible.

804 18. Does his physical and mental condition render training feasible? (See explanation on reverse.) Yes.

Signature BYRON HERMAN, M. D.
Grade Examiner U. S. P. H. S.

## Defendant's Exhibit B.

GLB H-223 805

UNITED STATES OF AMERICA.
WAR DEPARTMENT,
Washington, March 2, 1932.

I HEREBY CERTIFY *that* the documents hereto attached pertaining to Newton W. Lumbra, Army Serial Number 110,301, who enlisted July 14, 1917, for Company B, 1st Infantry, National Guard of Vermont, already in Federal service, served overseas from October 3, 1917, 806
to April 17, 1919, and was honorably discharged, in the grade of private, April 29, 1919, at Camp Devens, Massachusetts, are true photostatic copies of the report of examination for enlistment; the reports of examinations made prior to separation from service; one medical card; one field medical card; and one clinical record; the originals of which are on file in the Adjutant General's Office.

C. H. BRIDGES,
Major General, U. S. Army, 807
The Adjutant General.

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I HEREBY CERTIFY that C. H. BRIDGES, who has read the foregoing certificate, is ~~the~~ The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, PATRICK J. HURLEY, Secretary of War, have hereunto

*Defendant's Exhibit B.*

808 caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant ~~and~~ Chief Clerk of the said Department, at the City of Washington, this 3rd day of March, 1932.

PATRICK J. HURLEY,
Secretary of War.
By F. M. HOADLEY,
Assistant ~~and~~ Chief Clerk.

(Seal)
War Department.
809 Standard Form No. 13.

---

REPORT OF PHYSICAL EXAMINATION OF ENLISTED MAN PRIOR TO SEPARATION FROM SERVICE IN THE UNITED STATES ARMY

(Surname): Lumbra; (Christian name): Newton W.; (Army serial number): 110301.

(Grade): Pvt.; (Company, and regiment or
810 arm or corps or department): Co. B. 103 M. G Bn.

(Occupation prior to entry into service): Farmer.

DECLARATION OF SOLDIER

Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in the military service?

Answer: No.

*Defendant's Exhibit B.*

Q. If so, describe the disability, stating the nature and location of the wound, injury, or disease. 811

A. .....V.....

Q. When was the disability incurred?

A. .....V.....

Q. Where was the disability incurred?

A. .....V.....

Q. State the circumstances, if known, under which the disability was incurred.

A. .....V.....

812

I declare that the foregoing questions and my answers thereto have been read over to me, and that I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded.

NEWTON W. LUMBRA,
(Signature of soldier.)

Witness:
Jack B. Wood,
(Signature of witnessing officer.) 813
Capt. Co. B. 103 M. G. Bn.
(Rank and organizatoin.)

Place: Camp Devens, Mass.
Date: April 23, 1919.

Form No. 135-3, A. G. O.
Nov. 11, 1918.

*Defendant's Exhibit B.*

814 CERTIFICATE OF IMMEDIATE COMMANDING OFFICER

I CERTIFY THAT:

* Aside from his own statement I do not know, nor have I any reason to believe, that the soldier who made and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.

† injury, for disease, which was incurred about
815 ....., 191.., at .....

The nature and location of the † wound, † injury, † or disease, so far as known, are: .....
.....\.....

The circumstances under which incurred were .....
.....\.....

In my opinion the wound, injury, or disease \†did / †did not / originate in the line of duty in
816 the military service of the United States.

Remarks .....\.....

JACK B. WOOD,
Captain 103 M. G. B.,
Commanding Co. B.

Camp Devens, Mass. April 23, 1919.
(Place and date.)

* Strike out the part of the certificate not applicable to the case.

† Strike out words not applicable.

*Defendant's Exhibit B.*

CERTIFICATE OF EXAMINING SURGEON 817

I CERTIFY THAT:

The soldier named above has this date been given a careful physical examination, and it is found that

* He is physically and mentally sound.

* He is physically sound and with the following exceptions:

(Describe the nature and location of the defect, wound, injury, or disease.)

.....

818

The wound, injury, or disease († is X † is not) likely to result in death or disability.

In my opinion the wound, injury, or disease (†did †did not) originate in the line of duty in the military service of the United States.

In view of occupation he is 0 per cent disabled.

Remarks .....

819

MAJOR S. J. BLATT,
M. C., U. S. Army.

Camp Devens Ayer Mass. Apr 23 1919
(Place and date.)

* Strike out the part of the certificate not applicable to the case.

† Strike out words not applicable.

*Defendant's Exhibit B.*

820 REGISTER CARD

5723

(1) Surname. Lumbra
(2) Christian name Newton W
(3) Rank Pvt (4) Company B
(5) Regiment or staff corps 103d Mil Bn
(6) Age. Yrs. 26 (7) Race W
(8) Nativity Vt (9) Service. Yrs. 11 12
(10) Register No. 110301
821 (11) Date of Admission. June 18 18
(12) Source of admission. Base Hosp #116, AEF
(13) Cause of Admission. Sprain, battle, severe, left ankle. June 16 18. Incurred during bombardment, June 16, 1918.
Hosp. .....
(14) In Line of Duty? Yes
(15) Complication, sequ., etc. .....
(16) Disposition. C C APO #727.
822 (17) Date of Disposition July 19, 1918
(18) Name of Hospital, etc. BASE HOSPITAL No 9 A. E. F.
(19) Sent With Report of S. & W. for Month of ....., 1918
(20) From .....
(21) F. McU Capt. MeUSR U. S. ARMY
No.
(22) Of Disposition
No.
(23) Of Admission

*Defendant's Exhibit B.*

(24) Sub. No. .....

(25) Sub. No. .....

823

CLASSIFICATION

Form 52
Medical Dep't U. S. Army.
(Revised Oct. 17, 1910).

Space above this line to be left blank

824

(26) Days of Treatment in Current Case Current Year

| *Year, 1918* | *In Quarters* | *In Hospital* |
|---|---|---|
| January | | |
| February | | |
| March | | |
| April | | |
| May | | |
| June | | 13 |
| July | | 18 |
| August | | |
| September | | |
| October | | |
| November | | |
| December | | |
| Total | | 31 |

825

*Defendant's Exhibit B.*

826 FIELD MEDICAL CARD.

Name (Block letters.) Lemmra Newton W.
Rank Pvt. No. 110301
Regiment or Staff Corps 103 M. G. Co. B.

Sick Wounded
Line of Duty Yes or No.
(Strike out descriptions which do not apply.)

Field Hosp. No. Evac. Hosp. No.
Dressing Sta. No. Camp Hosp. No.
Date of Admission
827 Morphia
Dose and Time
A. T. Serum
Dose and Date
Diagnosis Sprained left ankle S. while in action during bombardment June 16, 1918

Base Hospital No.
Diagnosis (if altered from above)

Base Hospital No.
Diagnosis (if altered from above)
828

Date of entry and medical unit receiving patient must be recorded immediately on admission. Brief clinical notes are to be added later and signed by M. O.

Base Hospital No. 116 A. E. F.
Date of Entry June 18 1918
June 23 X ray shows no evidence of fracture
Base Hospital No. Base Hospital No. 9 A. E. F.

*Defendant's Exhibit B.*

Date of Entry Jul 14 829

7/16/18 History of sprained ankle June 16, 1918 Good position Good motion.

This card must accompany the patient, attached to his clothing. It must not be destroyed. It will be transmitted with the patient if he is evacuated to the U. S. Temperature charts or additional clinical notes may be sent with this card in the same envelope.

5723 46

CLINICAL RECORD 830

Baker

110301

Hospital F. H. 101

Register No. 3942. Ward A-3.

Name Lumbra Newton W.

Rank Pvt. Co. B. Regt. or Staff Corps 103 M. G.

Age (years) 26 Race W. Service (years) 11/12.

Birthplace Vt.

Station A. E. F. 831

Date of admission June 17, 1918.

Source of admission F. H. 104

Religion Cath.

Home address Montgomery Centre, Vt.

Name and address of nearest relative Mother. Celia Lumbra same.

Initials of admitting officer M. A. C.

(To be filled in by ward surgeon when case is completed.)

Disposition Evac. S. O. S. Hosp.

Date June 18 1918

*Defendant's Exhibit B.*

832 Final diagnosis. Sprained left angle S while in action during bombardment June 16, 1918.
Condition on completion of case Improved.

JOHN W. [redacted]UCHMAN
Ward Surgeon.

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## CLINICAL RECORD

### Family and Personal History

833 Occupation: Farmer.
Tropical service: no.
Habits as to alcohol: Beer once in while.
Family history: neg.
Previous personal history: never sick
Gunshot wounds or other casualties: no.
Venereal history: no.

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## CLINICAL RECORD

### History of Present Disease

834 (Date and mode of onset; probable cause; evolution and course to admission.)
June 16, 1918 In morning after the bombardment was going into dugout, slipped and sprained ankle.

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## CLINICAL RECORD

### Subjective Symptoms

Condition on admission: Great Pain in ankle. left.
Other side of left ankle quite swollen.

*Defendant's Exhibit B.*

## CLINICAL RECORD

835

### Objective Symptoms

Condition on admission: good.
Weight: Normal ; Present
General condition: Good
Special senses: ok.
Skin and mucous membranes: ok.
Glandular system: ok.
Vascular system: ok.
Blood pressure: V
Heart: normal
Lungs: normal
Genito-urinary system: ok.

836

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## CLINICAL RECORD

### Objective Symptoms—Continued

Abdomen: ok.
Liver,
Spleen,
Tenderness,
Masses,
Nervous system: ok.
Osseous system: ok.
Muscles and joints: sprain left ankle
Diagnosis on transfer card: Sprain lt. ankle.
Diagnosis of ward surgeon:

837

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*Defendant's Exhibit B.*

838 CLINICAL RECORD

RADIOGRAPHIC REPORT

Station Base 116. A. E. F.
Date June 20, 1918
From Ward 11—
To X-Ray.
Information requested: For fracture left ankle.
Clinical diagnosis:

839 Name illegible,
Major M. R. C.,
U. S. Army.

Laboratory X Ray.

June 23, 1918

X-ray findings: Radiographic examination shows no evidence of fracture

| PLATE | | | |
|---|---|---|---|
| *Number* | *Size* | *Part* | *Disposition* |
| 27 | 8-10 | Ankle L | |

840

WILLIAM S. GLENN, JR.,
Lieut. M. R. C.,
U. S. Army.

| Surname of Patient | Christian Name |
|---|---|
| Lumbra | Newton. |

| Rank | Company | Regiment or Staff Corps |
|---|---|---|
| Pvt. | B. | 103 M. G. Btn. |

## Defendant's Exhibit C.

CENTRAL VERMONT RAILWAY COMPANY. 841

Car Department, Northern Division.

Office of Mech. Supt. at St. Albans, Vt., Dec. 15th, 1924.

The following appointment is recommended:

Name in full: Newton W. Lumbra. Age 32.

Date of Appointment: December 12th, 1924.

Appointed To ... By Whom Recommended....

Occupation: Laborer.

Department: Freight Shop.

Station: St. Albans. 842

Salary or Wages * 35¢.

If an appointment to a new office, give particulars here.

If some one already in the service is to be succeeded, give her name and salary paid.

Succeeding K. A. Tatro, Laborer 35¢, reclassified temp.

Central Vermont Ry. Co.
Office of Time-keeper
#241
Dec. 18, 1924 843
St. Albans, Vt.

Approved
J. W. Wardlaw

B

H. F. NOWELL,
Signature of Officer Recommending.

*Give rate per month or per day.

SHOP

*Defendant's Exhibit C.*

844 CENTRAL VERMONT RAILWAY COMPANY.

Application for Employment.

Applicants for employment as SHOPMEN, LABORERS, &c., must fill up an application on this form.

No one need apply for employment who is NOT ABLE TO READ AND WRITE, is more than 50 years of age, and cannot produce a good character from his last employer.

Parties dismissed from the Service, or leaving
845 it for other employment to suit their own convenience are not to be re-employed.

N. B.—Testimonials are only accepted from respectable and well-known person, and in all cases their names, occupations and addresses must be given.

State your Christian and surname in full: Newton W. Lumbra.

State your age, and place and country of your birth: 32 Montgomery, 148

State what testimonials you have and attach
846 them hereto: .....√.....

Have you any physical defect, such as deafness or shortness of sight, rendering you unfitted for employment on a Railway: No.

State name and residence of your last employer, and attach a character from him on the form provided: .....

Have you ever been in the service before? If so, state reason for leaving: Eng. House, Sept. 1924. Resigned own accord.

Signature of Applicant

NEWTON W. LUMBRA.

*Defendant's Exhibit C.*

I have seen the applicant Newton W. Lumbra 847
and recommend him for employment at Frt Shop
as Laborer.

Date, .....19.

(Initials) (Initials)
Head of Dept.

## CONDITION OF ADMISSION TO THE SERVICE

Applicants for positions in the shop service, 848
must be over 16 and under 50 years of age, they
must be able to read and write, be free from all
bodily complaints and of a strong constitution.
The Candidate must produce testimonials of
character from his last employer and also from
some person of responsibility and position by
whom he is personally known; these with the
nomination will be submitted, on the candidate
appearing for examination, and it will be decided
whether he be a proper person to be appointed.

No employee must quit the service without giv- 849
ing thirty days' notice in writing of his intention
to do so. In the event of his leaving without such
sanction, all claim for pay due him will be for-
feited.

Appointments are made on the distinct under-
standing, that the parties hold themselves in
readiness to proceed to duty immediately on be-
ing summoned, their pay being allowed from the
date of employment; and that they reside
wherever required.

*Defendant's Exhibit D.*

850 I, the undersigned, have read and hereby agree to the above conditions.

NEWTON W. LAMBRA.

K. A. Pamelee, Witness.

## Defendant's Exhibit D.

CENTRAL VERMONT RAILWAY COMPANY.

MP Department, Northern Division.

851 Office of Mech. Supt. at St. Albans, Vt., July 12th, 1922.

The following appointment is recommended:

Name in full: Newton Lambra, Age 30.

Date of Appointment: July 12, 1922.

Appointed To . . . . By Whom Recommended.

Occupation: Mechanist Helper.

Department: Gang A.

Station: St. Albans.

Salary or Wages *: 47c.

If an appointment to a new office, give particu-

852 lars here.

If some one already in the service is to be succeeded, give here name and salary paid.

In place of strikers.

Central Vermont Ry. Co.
Office of Time-keeper
July 22 1922
St. Albans, Vt.

Approved
JWW

H. F. NOWELL,
Signature of Office Recommending.

*Give rate per month or per day.

*Defendant's Exhibit D.*

SHOP

852

CENTRAL VERMONT RAILWAY COMPANY.

Application for Employment.

Applicants for employment as SHOPMEN, LABORERS, &c., must fill up an application on this form.

No one need apply for employment who is NOT ABLE TO READ AND WRITE, is more than 50 years of age, and cannot produce a good character from his last employer.

Parties dismissed from the Service, or leaving it for other employment to suit their own convenience, are not to be re-employed. 851

N. B. Testimonials are only accepted from respectable and well known persons, and in all cases their names, occupations and addresses must be given.

State your Christian and surname in full: Newton Lumbra.

State your age, and place and country of your birth: 30. Montgomery.

State what testimonials you have and attach them hereto: None. 855

Have you any physical defect, such as deafness or shortness of sight, rendering you unfitted for employment on a Railway? None.

State name and residence of your last employer, and attach a character from him on the form provided: Nelson Hall & Co., Richford Vt.

Have you ever been in the service before? If so, state reason for leaving: No.

Signature of Applicant
NEWTON LUMBRA

*Defendant's Exhibit D.*

856 I have seen the applicant Newton Lumbra and recommend him for employment at St. Albans as Mach. Helper.

Date July 12th, 1922.

K. J. EDMUND
Head of Dept.

Clock #471
Mach. Hpr.
47 per hr.

(Initials)

857

## CONDITION OF ADMISSION TO THE SERVICE.

Applicants for positions in the shop service must be over 16 and under 50 years of age, they must be able to read and write, be free from all bodily complaints and of a strong constitution. The Candidate must produce testimonials of character from his last employer and also from
858 some person of responsibility and position by whom he is personally known; these with the nomination will be submitted, on the candidate appearing for examination, and it will be decided whether he be a proper person to be appointed.

No employee must quit the service without giving thirty days' notice in writing of his intention to do so. In the event of his leaving without such sanction, all claim for pay due him will be forfeited.

*Defendant's Exhibit E.*

Appointments are made on the distinct understanding, that the parties hold themselves in readiness to proceed to duty immediately on being summoned, their pay being allowed from the date of employment; and that they reside wherever required.

I, the undersigned, have read and hereby agree to the above conditions.

NEWTON LUMBRA.

Wm. R. Simpson,
Witness.

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**Defendant's Exhibit E.**

CENTRAL VERMONT RAILWAY COMPANY.

Car Department Northern Division.

Office of Mech. Supt. at St. Albans, Vt., February 20, 1924.

The following appointment is recommended:
Name in full Newton Wallace Lumbra #207
Age 31
Date of Appointment February 18, 1924.
Appointed To By Whom Recommended
Occupation Laborer
Department Freight Shop
Station St. Albans, Vt.,
Salary or Wages 35¢

If an appointment to a new office give particulars here. .....

*Defendant's Exhibit E*

802 If some one already in the service is to be succeeded, give here name and salary paid the employed succeeding them. F. Moulo, Laborer, 2nd has settled.

#207

H. F. NOWELL,
Signature of Officer Recommending

Approved
J. W. Wardlaw
H

803 Give rate per month or per day.

#207 SHOP

CENTRAL VERMONT RAILWAY COMPANY.

APPLICATION FOR EMPLOYMENT.

Applicants for employment as SHOPMEN, LABORERS, &c., must fill up an application on this form.

804 No one need apply for employment who is NOT ABLE TO READ AND WRITE, is more than 50 years of age, and cannot produce a good character from his last employer.

Parties dismissed from the Service, or leaving it for other employment to suit their own convenience, are not to be re-employed.

N. B. Testimonials are only accepted from respectable and well known persons, and in all cases their names, occupations and addresses must be given.

*Defendant's Exhibit E.*

State your Christian and surname in full. Newton Wallace Lambra 865

State your age, and place and country of your birth. Age 31 Born Montgomery, Vt.

State what testimonials you have and attach them hereto. V

Have you any physical defect, such as deafness or shortness of sight, rendering you unfitted for employment on a Railway? No.

State name and residence of your last employer, and attach a character from him on the form provided. Arnold Co. St. Albans. 866

Have you ever been in the service before? If so, state reason for leaving. Yes. M. P. Dept. Eng. House from July 1923 to May 1923. Left the service on my own record.

Signature of Applicant
NEWTON WALLACE LAMBRA

I have seen the applicant Newton W. Lambra and recommend him for employment at St. Albans as Laborer. 867

Date Feby. 18th, 1924.

ALF. SOUCIERE
(Initials H. F. N. 2/19) Head of Dept.

CONDITION OF ADMISSION TO THE SERVICE.

Applicants for positions in the shop service must be over 16 and under 50 years of age, they

*Defendant's Exhibit E.*

868 must be able to read and write, be free from all bodily complaints, and of a strong constitution. The Candidate must produce testimonials of character from his last employer and also from some person of responsibility and position by whom he is personally known; these with the nomination will be submitted, on the candidate appearing for examination, and it will be decided whether he be a proper person to be appointed.

869 No employee must quit the service without giving thirty days' notice in writing of his intention to do so. In the event of his leaving without such sanction, all claim for pay due him will be forfeited.

Appointments are made on the distinct understanding, that the parties hold themselves in readiness to proceed to duty immediately on being summoned, their pay being allowed from the date of employment; and that they reside wherever required.

870.

I, the undersigned, have read and hereby agree to the above conditions.

NEWTON WALLACE LUMBRA.

J. N. Daignault,
Witness.

## Defendant's Exhibit F.

File No. C 512 534. 871

APPLICATION OF PERSON DISABLED IN AND DISCHARGED FROM SERVICE.

1. Full name (Given name.) Newton (Middle name.) Wallace (Last name.) Lumbra
2. Address (Number.) .... (Street.) ..... .... (City or town.) Montgomery Centre (State.) Vermont.
3. Under what name did you serve? As Stated Above (a) Serial No. 110,301 872
4. Color White Date of birth April 17-1892 Place of birth Montgomery, Vt.
5. Make a cross (X) after branches of service you served in:
   General Service .... Limited Service .... Army X Navy .... Marine Corps .... Coast Guard ....
6. Date you last entered service July 14, 1917 Place of entry Fort Ethan Allen
7. Rank or rating at time of discharge Private 873
8. Company and regiment or organization, vessel, or station in which or on which you last served Co. B.—103" Machine Gun Battallion
8a. Give fully any other service in the military or naval forces, stating rank and organization None Other
9. Date and place of last discharge Camp Devens, April 29", 1919.
10. Cause of discharge Mustered Out. No further service required.

*Defendant's Exhibit F.*

874 11. Nature and extent of disability claimed Bronchial Troubles, Rheumatism, Nervousness

12. Date disability began Began to manifest itself about one year ago.

13. Cause of disability Foreign Service, Gas and Exposure.

14. When and where received In France.

15. Did you receive treatment at an Army or Navy hospital? Yes (a) If so, state name and location of the hospital Base

875 Hospital, #116. Place Unknown

16. Occupations and wages before entering service: Farming. #40.00 and ~~Kept.~~ board and washings.

17. Last two employers before entering service: (Employer's name.) Albert C. Lambra (Address.) Fairfield, Vt. (Time employed.) One Month

(Employer's name.) E. E. Touchette (Address.) Montgomery Ctr., Vt. (Time employed.) Two months

876 18. Occupation since discharge, dates of each, and wages received. If less than before, why? (Occupation.) Laborer in Factory (Commencing date.) July, 1919 (Ending date.) Jan. 1", 1921 (Monthly wages.) $3.00 per. diem

(Occupation.) ~~E. E. Touchette~~ Farming (Commencing date.) Jan. 11", 1921 (Ending date.) ..... (Monthly wages.) $2.50 p. d. board

19. Present employer (Full name.) .....
(Address.) .....

*Defendant's Exhibit F.*

29. Name and address of attending physician F. B. Hunt Montgomery Ctr., Vt. 877
21. Are you confined to bed? No Do you require constant nursing or attendance? No
22. Name and address of nurse or attendant None
23. Are you willing to accept medical or surgical treatment if furnished? Yes.
24. Are you single, married, widowed, or divorced? Married.
25. Times married Once
26. Date and place of last marriage May. 17, 1920 878
27. Times present wife has been married Once.
28. Maiden name of wife Hazel Anna Lavalla
28a. Do you live together? Yes
29. Date of wife's birth (Day) Dec. 22nd, 1902 (Month.) ..... (Year.) .....
30. Have you now living a child or children, including a stepchild, adopted child, or an illegitimate child, under eighteen years of age and unmarried? No.
31. If so, state below full name of each child and date of birth; if a stepchild or adopted child, so state, and give date stepchild became a member of your household or date adopted child was adopted by you. 879
32. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless? No
33. Give name and address of each parent living None Living
34. Age of mother .... Age of father ....

*Defendant's Exhibit F.*

880 35. (a) Is your mother now dependent on you for support? .....
(b) Is your father now dependent on you for support? .....
(c) If so, give your average monthly contribution to your mother, $ ....; your father, $ ....

36. (a) Value of all property owned by your mother, $ ....; your father, $ ....
(b) What is the monthly income of your mother, $ ....; your father, $ ....

881 37. Did you make an allotment of your pay? Yes.

38. If so, to whom? Celia Hattie Lumbra, my mother, now dead.

39. Give number of any other claim filed on account of this disability and place where filed 512,534 Washington, D. C.

40. Did you ever apply for War Risk Insurance? Yes (a) When and where? Camp Bartlett Sept., 1917. (b) Insurance certificate number 2004073

882 41. Name of beneficiary Celia Hattie Lumbra.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

NEWTON W. LUMBRA
(Signature of claimant.)

Subscribed and sworn to before me this 17 day of January 1921, by Newton W. Lumbra, claim-

*Defendant's Exhibit G.*

ant, to whom the statements herein were fully made known and explained. 882

P. H. COLEMAN,
Notary Public.

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We, the undersigned, severally solemnly swear that we have known the claimant whose name is subscribed above twenty years, and that we have read the statements made by him, and the facts stated are true to the best of our knowledge and belief.

Leon. Dunn Montgomery Center, Vt. 884
H. H. Tracy Montgomery Center, Vt.
(Signature of witness.) (Address of witness.)

Subscribed and sworn to before me this 17 day of January, 1921.

P. H. COLEMAN,
Notary Public.

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## Defendant's Exhibit G.

APPLICATION OF VETERAN DISABLED IN THE WORLD WAR FOR COMPENSATION AND VOCATIONAL TRAINING 885

APPLICATION FOR COMPENSATION AND VOCATIONAL TRAINING

*A.* PERSONAL HISTORY.

1. Full name (Last Name.) Lumbra (First Name.) Newton Wallace
2. Address (Number.) .... (Street.) ..... (City or Town.) Richford (State.) Vermont.

*Defendant's Exhibit G.*

886 3. Under what name did you serve? Newton W. Lambra.

4. Color White Date of birth April 17th, 1892 Place of birth Montgomery Ctr., Vt.

*B.* MILITARY EXPERIENCE AND RELATED INFORMATION.

5. Make a cross (X) after branches of service you served in:
General Service .... Limited Service .... Army X Navy .... Marine Corps .... Coast Guard .... (a) Give Serial
887 No. 110301

6. Date you last entered service July 14th, 1917 Place of entry Fort Ethan Allen Vt.

7. Date of last discharge April 29, 1919 Place of discharge Camp Devens Mass.

8. Company and regiment or organization, vessel on which, or station in which, you *last* served Co. B 103 Machine Gun Bn.

9. Rank or rating at time of discharge Private

10. Nature of discharge: Honorable yes;
888 Ordinary ....; Dishonorable ....; Bad conduct ....; S. C. D. ....

11. Nature of disability claimed Lungs & Throat Degree of disability Partial.

12. Date disability began year ago

13. Cause of disability gas

14. Where received Toul Sector

15. Did you receive treatment at an Army or Navy Hospital, or any other hospital? No (a) If so, state name and location of the hospital and dates of treatment .....

*Defendant's Exhibit C.*

16. If the injury was caused through the fault of some person other than the United States or the enemy, state whether suit has been commenced against, or settlement made with such person on account of such injury: .... 889
If settlement has been made or damages recovered state which, and the amount: ....

*C.* OCCUPATIONAL EXPERIENCE.

17. What was your principal occupation or trade before entering the service?
(Occupation.) Mill work (Monthly wages.) 40 dollars. (Date.) July 14th, 1916. 890

18. Give any other occupation or trade in which you were engaged:

19. Last two employers before entering the service:
(Employer's name.) Nelsen Hall Co. (Address.) Montgomery Ctr. (Time employed.) 1 year
(Employer's name.) Nelson Hall Co. (Address.) Montgomery Ctr. (Time employed.) Previous 891

20. Occupation since discharge, dates of each, and wages received. If less than before, why? (Occupation.) Mill (Commencing date) July, 1919 (Ending date) Still working (Monthly wages) 40.

21. Present employer (Full name.) .....
(Address.) .....

*D.* EDUCATIONAL HISTORY.

22. How far did you go in grade school? 9th grade. In high school? No

*Defendant's Exhibit G.*

892 23. What other schooling have you had, such as college, Army or Navy school, night school, correspondence school, etc. (Answer fully.) None

*E.* MEDICAL DATA.

24. Name and address of physicians who have since discharge attended you for your disability None

25. Are you confined to bed? No. Do you require constant nursing or attendant? No.

893 26. Name and address of nurse or attendant .....

27. Are you willing to accept medical or surgical treatment if furnished? Yes.

*F.* FAMILY OBLIGATIONS AND DEPENDENCY CLAIMS.

28. Are you single, married, widowed, or divorced? Widowed.

29. Times married Once. Date and place of last marriage May 17th, 1920.

30. Times present wife has been married Once.

31. Do you live together? Dead (a) If not, 894 state why you are not living together, and your wife's present address .....

32. Give below the information required concerning each dependent child under 18 years of age and unmarried.

Name of Child: Ada Hazel Lumbra Date of birth Day 24 Month 3 Year 1921 Name and Address of Person with Whom Child Lives: Frank Lavella, Montgomery Ctr., Vt.

33. If any child mentioned in question 32 is an adopted child, give name of such child and date of adoption .....

*Defendant's Exhibit G.*

If a stepchild, give name and date such child became a member of your household .....

895

34. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless? No. If so, give name and age .....

35. Give name and address of each parent living Both dead.

36. Age of mother .... years.

37. Age of father .... years.

38. (a) Is your mother now dependent on you for support? .....

(b) Is your father now dependent on you for support? .....

896

39. If compensation is claimed on behalf of either parent, or both, answer the following questions:

(a) Are they living together? .....

(b) Widowed or divorced? .....

(c) Are they incapable of self support? (Yes or no) .....

(d) If so, how is each incapacitated?

Mother .....

Father .....

897

(e) The average monthly contribution you gave to your mother, $..; your father, $....

(f) Value of all property owned by your mother, $....; your father, $:...

(g) What is the monthly amount of money received by your mother from all sources, $....; your father $....

40. If you claim disability of father, a physician's certificate must be attached hereto

*Defendant's Exhibit G.*

898 showing to just what extent he is incapacitated.

41. Give the following information concerning *all* of your brothers and sisters. If you have none, write "None" in blank space below.

| *Name* | *Age* | *Residence* | *Married.* | *Occupation* | *Annual Income* |
|---|---|---|---|---|---|
| William Lumbra | | Montgomery | Yes | Farmer | don't know |
| Albert C. Lumbra | | East Fairfield | " | " | " |
| Freemont " | | Montgomery | " | Mill work | " |
| Walter " | | " | " | Farmer | " |
| 899 Jay T. Lumbra | | " | " | Truck Driver | " |
| Lillian Brooks | | North Troy, Vt. | " | Housewife | " |
| Mrs. Bettie Foote | | Montgomery | " | " | " |
| Mrs. W. M. Downey | | East Highgate, Vt. | " | " | " |
| Mrs. Iva Touchette | | Montgomery | " | " | " |
| Mrs. Joe Kemnette | | " | " | " | " |

*G.* MISCELLANEOUS INFORMATION

42. Did you make an allotment of your pay while in the service? Yes.

43. If so, to whom? Mother.

900

44. Give number of any other compensation claim filed on account of this disability and place where filed No.

45. Did you ever apply for War Risk Insurance? Yes (a) When? In service (b) Where? Camp Bartlett Mass. (c) Amount? 10,000.

46. Name of beneficiary in application for insurance. Mrs. Celia Lumbra.

47. Have you since changed the beneficiary to some other person? No.

(a) If so, to whom? .....

48. Have you ever previously applied for vocational training? No.

*Defendant's Exhibit G.*

Give facts briefly ..... 901

49. Do you wish vocational training? Yes.

I make the foregoing statements as a part of this applicat on with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation, insurance, or vocational training.

NEWTON W. LUMBRA.
(Signature of claimant.)

Subscribed and sworn to before me this 21 day of Mar., 1922, by Newton Lumbra, claimant, to whom the statements herein were fully made known and explained. 902

S. CARL CARPENTER,
(Seal) Notary Public.

We, the undersigned, severally solemnly swear that we have known the claimant whose name is subscribed above 29 years, and that we have read the statements made by him, and the facts stated are true to the best of our knowledge and belief. 903

| | |
|---|---|
| Ernest R. Lagrue | Richford, Vermont. |
| (Signature of witness.) | (Address of witness.) |
| Merle C. Lumbra | Richford, Vt. |
| (Signature of witness.) | (Address of witness.) |

Subscribed and sworn to before me this 21 day of Mar., 1922.

S. CARL CARPENTER,
(Seal) Notary Public.

## Petition for Appeal.

904 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

| | |
|---|---|
| NEWTON W. LUMBRA,<br>vs.<br>UNITED STATES OF AMERICA. | Law No. 816. |

*To the Honorable, the United States District Court in and for the District of Vermont:*

The above named defendant, United States of America, believing itself aggrieved by the judg-
905 ment made and entered herein on the twenty-eighth day of April, 1932, in favor of the plaintiff against the defendant, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit; for the reasons specified in the Assignment of Errors filed herewith, and it prays that this appeal may be allowed and a citation issue directed to the plaintiff, Newton W. Lumbra, commanding him to appear before said Appellate Court to do and re-
906 ceive what may pertain to justice in the premises, and it further prays that a transcript of the record proceedings and papers in this cause, duly authenticated, upon which said judgment is based, may be transmitted with this appeal to the said Circuit Court of Appeals pursuant to the rules and statutes as in such cases made and provided.

UNITED STATES OF AMERICA.
By HARRY B. AMEY,
United States Attorney.
ALLEN MARTIN,
Assistant United States Attorney.
WM. J. HESSION,
Chief Attorney, Veterans' Administration.

Approved: 907
July 27, 1932.
Harland B. Howe,
D. J.

Filed July 27, 1932,
A. Myrl Blakely,
Deputy Clerk.

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## Assignment of Errors.

UNITED STATES DISTRICT COURT 908
FOR THE DISTRICT OF VERMONT.

| | |
|---|---|
| NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA. | Law No. 816. |

Now comes the defendant, the United States of America, by its attorneys, Harry B. Amey, United States Attorney, Allen Martin, Assistant 909
United States Attorney, and William J. Hession, Chief Attorney, Veterans' Administration, and in connection with its appeal assigns the following errors, which Appellant avers occurred on the trial of said cause and on which it relies to reverse the judgment therein, as appears of record.

1. The Court erred in denying defendant's motion for a directed verdict at the close of all the evidence in the case. The motion was urged upon the court in substance as follows:

910 "Mr. Fitzgerald: At this time I would like to file a Motion for a Directed Verdict.

The Court: Have you any evidence in rebuttal?

Mr. McNamara: No.

The Court: Read it.

Mr. Fitzgerald:

'UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

911

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } No. 816.

MOTION FOR DIRECTED VERDICT.

Now comes the defendant in the above entitled action at the close of all the evidence and moves for a directed verdict in its favor on the ground that upon all the law and the

912 evidence in this case the plaintiff is not entitled to recover for the reason that the plaintiff has not proved he was permanently and totally disabled on or before May 31, 1919, and that the evidence introduced in the case is insufficient to support a finding that the plaintiff was permanently and totally disabled on or before the 31st day of May, 1919.

HARRY B. AMEY,
U. S. Atty. for the District of Vermont.
By FRANCIS J. FITZGERALD,
Assistant Insurance Attorney."

The Court: You make that 31 and I make it the 29th. 913

Mr. Fitzgerald: The war risk insurance was paid for the month and even though he were discharged on the 29th, it would have been paid for the rest of April, and he would have 31 days grace, which would be May 31st.

The Court: I think this is a case to be decided by the jury. It is not for the Court. There's evidence here from which the jury can well find he was permanently and totally disabled on the 31st day of May, 1919, and that 914
being so, it is the plain duty of the Court to submit the case to the jury.

Mr. Fitzgerald: Exception?

The Court: Exception, yes.

Mr. Fitzgerald: The defendant rests.

2. The Court erred in excluding evidence of the defendant as to whether or not plaintiff "was a drinking man." The defendant alleges it had the right to show the extent to which plaintiff was addicted to the use of alcohol under the theory 915
that such usage might have been the cause of said epileptic seizures, and that it was error for the Court to rule that before the introduction of such evidence the defendant must first show that alcohol was a probable cause and not merely a possible cause of epilepsy.

"Q. Do you know whether or not Mr. Lumbra was a drinking man and how do you know?

Mr. McNamara: I object to that.

916 The Court: We haven't had any doctors testify that this man's condition is due to the use of alcohol.

Mr. Fitzgerald: They all testified it might be.

The Court: But none said there is any probability to believe it is true in this case.

Mr. Fitzgerald: They all said there's a number of causes.

The Court: I think to be perfectly fair in this case, that the Government should first
917 show that his condition is due to the use of alcohol, or there's some reasonable probability of it having affected it. Instead of turning the trial into a trial of the man's character and habits, we should try his case, it seems to me.

Mr. Fitzgerald: We are offering this testimony, your Honor, for three purposes:—credibility,—to show loss of time from work, and to show the possible cause of his condition.

918 The Court: But you haven't put in any evidence that tends in the least to show his epileptic fits are due to his use of alcohol. Now it is true, of course, that you asked the Doctor if such a thing is possible. Why yes,—it is possible. It is possible you will fall down tonight when you go to your hotel and kill yourself, but not probable. Now if you really want to try the case, you should try to show there's some reasonable ground that the use of alcohol caused his condition,—

is the cause of his fits. Now there isn't any 919
evidence to that effect here. The evidence on the other hand is that this is a functional disturbance; the evidence is he injured his brain at the time of the shell explosion, and when he became unconscious. If you have any evidence or are going to produce any to tend to show his fits are caused by the use of intoxicating liquor, you should put that in first.

Mr. Fitzgerald: If the Court please, all the medical testimony here has been that epi- 920
lepsy may be caused by many things. Dr. Skeels is the only one who stated it was his firm conviction it was caused by his injury in France, and we hope to show there was no injury received in France.

The Court: Why not start the trial in that way?

Mr. Fitzgerald: This particular witness wants to get home.

The Court: It would be better for his wants to go unsatisfied rather than to do a 921
wrong to this plaintiff.

Mr. Fitzgerald: We wouldn't do any wrong to the plaintiff intentionally.

The Court: It wouldn't help him any whether done unintentionally. I have a very clear recollection of the trial.

Mr. Fitzgerald: May I have an exception to your Honor's ruling?

The Court: Yes. I am just postponing this. Put in your other evidence first. The Court isn't willing to turn this into a trial of the soldier's habits in life. The question is:

922 Is he incapacitated and enfitled to his insurance?—not whether he becomes intoxicated, —unless there's some evidence here that the use of intoxicating liquor is the cause of his disability.

Mr. Fitzgerald: Your Honor, there's evidence it may be the cause.

The Court: That is way from the real issue. It may be a great many causes of his condition; a great many possible causes. Now I won't exclude your evidence. I just
923 say you postpone this evidence and see what your evidence is going to be as to whether his condition is caused by the use of intoxicating liquor. I won't exclude it now, but I just ask you to postpone that part of your case, notwithstanding your witness' necessity to get home. That is unimportant.

Mr. Fitzgerald: If the Court please, it will be impossible to attribute alcohol as being the cause without showing the use of it.

The Court: No, you have this man's con-
921 dition here—all his symptoms,—you have his career,—now is there any professional man—that would be an expert question,—who will say his condition may have been caused by the use of intoxicating liquor? Another thing about that he did not have this disturbance before this explosion in France, but he did right after that, in mild form, and they have been increasing and more severe. I will ask you to postpone this part of your case until after we see what the other doctors are going to say about this.

Mr. Fitzgerald: I don't think it would be 925
fair to ask doctors to say this was the cause; the possible or probable causes are too numerous.

The Court: I think it would be very fair, and I think it would be very unfair without asking a doctor first that question.

Mr. Fitzgerald: If alcohol is the cause of this man's condition?

The Court: Yes.

Mr. Fitzgerald: Your Honor, no doctor could say it. The doctors who have already 926
been on the stand have said it is a possibility. Whether it is a probability or not is for the jury to decide.

The Court: I shall not submit it to them to decide unless there's some evidence to support it. That is fundamental for hundreds of years.

Mr. Fitzgerald: I am trying to put in that evidence to support that hypothesis—that is the cause.

The Court: You just said you don't ex- 927
pect any doctor to testify to that, and it certainly is an expert question. If a doctor cannot give an opinion on it, it is the plain duty of the Court not to let the jury decide the question, because it would be on a mere guess. No question can be submitted to the jury to decide that there isn't any evidence to support.

Mr. Fitzgerald: I submit there's evidence in there that there's a possibility that is the cause.

928 The Court: It should not be submitted to the jury if it is a possibility. It has to be a probability.

Mr. Fitzgerald: It is being offered your Honor to show loss of work.

The Court: You say the use of intoxicating liquor has a bearing on a person's credibility, and I will pause here to have you bring me some law on that question.

Mr. Fitzgerald: I wish to apologize. I was mistaken. I meant his conviction would
929 be admissible.

The Court: On that question you are right. His conviction would be but not as a bearing on the cause of his disease.

Mr. Fitzgerald: It may be also offered to show probable or possible loss of time from work. This man has stated his broken employment; worked and was off; may the jury not consider the fact that that might have been caused by things other than epilepsy?

The Court: Yes, of course, it may. A man
930 may go hunting and lose some time, or go fishing and lose some time, or be sick and lose some time, or go to the circus and lose some time. If you can show he was drunk and lost time, not because of his health, I will admit it for that purpose,—because he was drunk,—not because of ill-health; that is admissible.

Mr. Fitzgerald: All right your Honor.

The Court: That must be shown, of course, at the time he lost the time. A man is entitled

to his insurance even if he does take a drink 931
or becomes intoxicated. The Government made a contract with this plaintiff by which it agreed to insure him and didn't put into it that if he got intoxicated it would become void. We should be very careful here to try this man's case on his policy,—his insurance that he bought from the Government, and not on his habits. No matter what kind of a man he is, he is entitled to his insurance, if he's drunk all the time, unless his drunkenness is the reason for his ill-health. Have I made 932
that clear to you gentlemen? A man steps up to the Government and buys his insurance policy of them, or the Metropolitan Insurance Co. and buys a policy of them, and sues them—why it isn't a defense that they can interpose against paying the insurance because the man got drunk on one or more, or on all occasions unless his drunkenness has caused his disability. Now in this case, if this plaintiff, this soldier boy, was disabled while he was in the war, he is entitled to his 933
insurance, if he's been drunk all the time ever since his discharge, unless the fact is that he was not disabled by reason of his service in the war but has become disabled by reason of his drunkenness since the war. Have I made that clear to you? Now as I said yesterday, we should try this man's case and try the Government's case and decide it and decide it right. It is the duty of the Court not to submit any question to the jury to de-

934 cide unless there's some evidence to support these questions. Whether there's any evidence in the case to support a given question is a question of law for me to decide, but if there's evidence to support a question, then it is a question for you to decide.

Mr. Fitzgerald: I submit there's some evidence in there—all of the doctors have given that as a possibility.

The Court: We will stop here and let you consult the books and show me some law to
935 that effect. It hasn't been written in the books yet so far as I have had occasion to look at them, but on the contrary, the rule is just the reverse. Unless there's some evidence in the case more than a possibility—unless there's some evidence tending to show probability the fact is so, then it is not a question for the jury to decide. Now that has been the law for a good many hundred of years. Now on your question that his drunkenness is the reason he did not work more, we leave
936 that open for you but it must be connected he did not work on certain such occasions because drunk,—but the evidence must be strong and convincing enough to show such continual intoxication—to show the inference is he could not work because intoxicated."

3. The Court erred in that part of its charge when it said "Did he go into the War a sound man in health and come out a ruined man in

health, so that he could not work continuously at 937
a gainful occupation, notwithstanding neither he nor his physician were aware of his affliction until much later?"

"Mr. Fitzgerald: Yes, if the Court please, I would like an exception to that part of the Charge which states he would be totally and permanently disabled when neither he nor his physician knew it. A man would be the best judge of his own condition.

The Court: Have you any law to that effect? I don't want to hear any argument 938
about it.

Mr. Fitzgerald: It is the evidence in this case. We object to that point because doctors have testified that men with epilepsy could work without endangering their health.

The Court: One doctor did; two or three others testified it would.

Mr. Fitzgerald: The testimony in here has been by doctors that persons with epilepsy don't endanger their health by working.

The Court: The exception was to what 939
I said 'when neither he nor his physicians were aware of his affliction until later'. I stated the law as the higher Courts have stated it and unless you have something later?

Mr. Fitzgerald: The only statement I wish to make is what I have made. May I have an exception?

The Court: You say because certain doctors testified here that persons who were ner-

940 vous could work without injuring themselves, that I should not charge the law of the land?

Mr. Fitzgerald: I don't think that Charge fits this case, and that is why I am asking for an exception.

The Court: I am asking you,—not what you think about it,—I said the higher Courts have decided that the law is just as I have stated it and unless there's some decision that I haven't seen,—and if you have a de-
941 cision to that effect, why I will be glad to have you tell me where it is, so I can look at it and correct my Charge.

Mr. Fitzgerald: If I had a citation on it I would have furnished it to you. I am merely asking an exception on it your Honor.

The Court: You say you haven't any case?

Mr. Fitzgerald: Not in hand at this moment.

The Court: Very well, take your exception; because if you do know of a case, you
942 should tell me about it so I can change my Charge."

4. The Court erred when in its charge it said "A good test or illustration of total disability is: Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by? A good test,—an accurate illustration of total and permanent disability,—that has been written into the books by the higher Court."

"Mr. Fitzgerald: I would like an exception also your Honor to that part of the Charge—'Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by?' You must find that condition prevailed on or before May 31, 1919; not what may have happened subsequently. 943

The Court: That is taken from the Circuit Court's opinion word for word. 944

Mr. Fitzgerald: I am familiar with that opinion. May I have an exception.

The Court: Certainly. You don't have to get it from me. I haven't anything to say about it."

5. The Court erred when it charged "If employers won't hire him after they learn of his actual condition—because of that condition,—he is totally disabled within the meaning of the law, notwithstanding he is physically able to do many kinds of manual work." 945

"Mr. Fitzgerald: I would like an exception also your Honor to that part of the Charge 'If employers won't hire him after they learn of his actual condition';—they must find that condition prevailed in 1919.

The Court: That language is taken from the Circuit Court opinion too, word for word.

Mr. Fitzgerald: Exception.

The Court: If you have anything later

946 that changes that, you ought to tell me about it. Have you?

Mr. Fitzgerald: I have no citation your Honor.

The Court: You are familiar with the case in which that was held, of course? If employers won't hire him—you are familiar with that case, are you not?

Mr. Fitzgerald: Yes, it is an epileptic case if I recall, but I believe that man had seizures back at that time.

947 Mr. McNamara: No, they developed later.

The Court: This is an epileptic case, that is why I put it in there."

6. The Court erred when it charged "The Government contends that the plaintiff is physically and mentally able to work at a gainful occupation a large part of the time, but if you find that employers refuse to employ him because he is too frequently sick,—because he is unable to do a good day's work,—because of the danger 948 from such a workman,—a workman who suddenly has faint spells, dizzy spells, epileptic fits or convulsions,—then he is totally disabled."

"Mr. Fitzgerald: I would like an exception also your Honor to that part of the Charge—'If you find that employers refuse to employ him because he is too frequently sick,—because he is unable to do a good day's work, because of the danger from such a workman,—a workman who suddenly has faint spells, dizzy spells, epileptic fits or con-

vulsions—' we say the jury must find that 949
condition to be as of 1919.

The Court: I am bound by what the Higher Courts have said.

Mr. Fitzgerald: I want an exception your Honor. There is also an opinion in one of the Circuit Courts which states that even though the disease had begun and was progressive, unless it had reached a point of total and permanent disability before the date of the expiration of the contract, there could be no recovery. It is admitted this is 950
a progressive disease if it is true epilepsy.

The Court: That is just what I have told this jury in starting. You cannot expect me to repeat everything in every paragraph. (First paragraph in Charge read by the Court at this time.)

Mr. Fitzgerald: Exception."

WHEREFORE, the defendant prays that judgment of the District Court for the District of Vermont may be reversed. 951

UNITED STATES OF AMERICA,
By HARRY B. AMEY,
United States Attorney.

ALLEN MARTIN,
Assistant United States Attorney.

WM. J. HESSION,
Chief Attorney, Veterans' Administration.

Endorsed:
Filed July 27, 1932,
A. Byrl Blakely,
Deputy Clerk.

## Citation.

952 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } Law No. 816.

*The President of the United States of America to Newton W. Lumbra, Greeting:*

You are hereby cited and admonished to be and
953 appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden in the Borough of Manhattan, in the City of New York, in the State of New York, on the 24th day of August, 1932, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Vermont, wherein the United States of America is appellant, and you are Appellee, to show cause, if any there may be, why the judgment against the said Appellant as in the said appeal mentioned, should
954 not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Burlington, in the State and District of Vermont, within said Circuit, this 27th day of July in the year of our Lord, One Thousand Nine Hundred Thirty-two and of the Independence of the United States of America, the One Hundred Fifty-sixth year.

HARLAND B. HOWE,
Judge of the District Court of the
United States for the District of Vermont.

*Acceptance of Service.*

Endorsed: Returned with service accepted, August 2, 1932. 955

A. MYRL BLAKELY,
Deputy Clerk.

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## Acceptance of Service.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } Law No. 816. 956

Receipt of a copy of the Assignment of Errors, Petition for Appeal, and Citation in the above case, which in the Circuit Court of Appeals will be entitled United States of America, Appellant (defendant below) vs. Newton W. Lumbra, Appellee (plaintiff below), is hereby acknowledged and service of the same is hereby acknowledged and all other and further service and formalities of service and notice are hereby waived. 957

Dated at Burlington, Vermont, July , 1932.

NEWTON W. LUMBRA,
by J. A. McNamara,
his attorney.

Filed August 2, 1932,
A. Myrl Blakely,
Deputy Clerk.

## Supplemental Assignment of Errors.

958 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

| | |
|---|---|
| NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA. | Law No. 816. |

Now comes the defendant, the United States of America, by its attorneys, Harry B. Amey, 959 United States Attorney, Allen Martin, Assistant United States Attorney, and William J. Hession, Chief Attorney Veterans' Administration, and in connection with its appeal assigns the following additional errors, which Appellant avers occurred on the trial of said cause, and on which it relies to reverse the judgment therein, as appears of record.

1. The Court erred in admitting evidence against the objection and exception of the de- 960 fendant, in the testimony of Walter E. Bell, relating to a bombardment on the Western Front, as follows:

Q. Was it a pretty general shelling you got there that morning?

A. Yes, it was.

Q. Did you see the effect of this bombardment on some of the men,—just what happened to them?

A. Yes.

Q. Describe that to the jury.

Mr. Fitzgerald: I object to him describing 961
anything that does not relate to Mr. Lumbra, as being immaterial and irrelevant.

The Court: Why not, to show its severity or mildness?

Mr. Fitzgerald: It might have killed twenty-five men and not affect Mr. Lumbra.

The Court: As showing the severity,—whether much or little,—powerful or mild.

Mr. McNamara: It is our contention this shell did not strike him, nor any fragment, but shells exploding that way had a peculiar 962
action in causing a curious concussion. Some men were decapitated entirely,—blown to pieces, although nothing hit them. This man was there and saw this happen.

Mr. Fitzgerald: Exception?

The Court: Yes.

Mr. McNamara: This, of course, will be in connection with the plaintiff's testimony he was thrown forty feet, as to whether or not that is probably so;—corroborating that fact. 963

Q. Go on and describe to the jury the bombardment and the concussion effect of these shells.

A. Well on leaving the dugout entrance—directly after we come in we got notice we have got to go back,—the minute we left the dugout this particular morning, as we start for our positions that were our positions in the trenches a few hours previous, we find on leaving the dugout we are all in the midst

9964 of the bombardment and we have got to take our best course to get to what I call our positions. We have got to get in there and set up another gun to prohibit the enemy from coming, and on the way over to the position I was travelling with another soldier from this same territory and several others from a different territory, and in trying to get at the position that is the most serious, on the way over we deliberately get throwed or pushed down several times with this terrible
9965 force of the shells breaking. If the shells break close to you they will take your life without possibly any notice whatsoever to you. Shells that whistle by you, you have no fear of; you can hear them and know about where they will land from you. Other shells that strike within twenty five or thirty feet from you will push you and throw you from the force of the shell but might never injure you,—which we have all had that occasion,
9966 —us fellows that have been there, to be throwed.

Q. How far did they throw you?

A. Several feet; twenty-five or thirty feet, and still not hurt you. If they're still further away they might tear you up from the fragments of the shell. They break in an arch form, and if you are in the halfway distance of the arch, you will feel just the concussion, which in my own instance I have been several times forced deliberately on my face, and with my eyes closed as hard as I

could close them, still see the flash and still be uninjured. If you were further away you would be torn from the fragments of the shell. These boys that went with me this particular morning,—we have one,—I don't see him here but he could be brought here,—and he was covered up completely,—just his head remained above the trench, from one of the shells breaking. His head was above the trench. There was no harm done to him but the concussion caved the trench in on him. We remained in this position and had to stay there in my particular position until after things quietened down. This happened in the morning about nine o'clock. We had to remain there because a few had caved into the dugout, but the enemy's plane was above us and it was taking photographs of the damage it had done. We couldn't make any change in our position, we had to remain there, so when I did leave this position to enter the dugout was the time I saw the casualties, which we became hard-hearted to,—and I saw Mr. Lumbra for the first time, being worked on. 967 968 969

2. The Court erred in admitting evidence against the objection and exception of the defendant in the testimony of the same witness relating to the effect of concussion of soldiers other than the plaintiff.

Q. Did you have some men in your outfit who underwent this type of concussion that

970 developed into mental cases while with you there in the service?

Mr. FitzGerald: I object—too highly immaterial and irrelevant.

The Court: That shows whether others were similarly affected.

Mr. FitzGerald: I lost an ear over there and others were not injured at all. That would not indicate they suffered injury.

The Court: I think I will let that go in.

Mr. FitzGerald: Exception.

971 Q. Tell us about that.

A. Yes, it has happened to several within our Company that we have had experience with. The first Vermonter killed in the World War was killed by concussion and he was not hit by any fragments of shells.

Q. Did some of them develop insanity or marked mental trouble?

A. In this particular case he was killed instantly, and others in the Company I believe are drawing compensation for injury;

972 they were shell-shocked at the time and had to be relieved.

Q. You remember that?

A. Yes, sir.

3. The Court erred in admitting evidence against the objection and exception of the defendant in the testimony of the witness Dr. Albee A. Skeels, in that he permitted the witness to go into detail in matters which were not at all responsive to the question.

Q. Will you tell us just how you happened to become acquainted with this case and interested in the matter? 973

A. He came over to my office and naturally began to speak about his case, and I immediately thought of a case in a friend of mine exactly similar to his, and cases I had already seen. Now it is a question in my mind then whether it is a case—you talk about shock—that is a very, very loose term,—you see, shock means a lot;—if I tell a man he's had a shock in most people it 974
means apoplexy or he had a nervous shock if may mean simply nervousness,—neurasthenia. To my thinking it is a question of drawing a line between a functional trouble, that is a trouble due to nervousness—what we say hysteria,—or an actual organic trouble. Now as I grow older, I very much doubt a good many cases of so-called functional trouble—they're not really organic trouble. For instance—shell shock in many
cases is called a sort of functional disease, 975
a disease of the nerves. You know what I mean—a woman is nervous at times,—it is a different thing; nervous is a very, very loose term and so is shock. Now in many cases of shell shock there's some organic basis to it;—there will be blood in the spinal fluid,—

Mr. FitzGerald: I submit it is not responsive.

976 The Court: It doesn't matter if it isn't it's all admissible, isn't it?

Mr. Fitzgerald: May I have an exception?

The Court: If it doesn't relate to the case, I will sustain your objection, but I won't sustain it because it is not responsive to the question.

Mr. Fitzgerald: I don't think the fact the Doctor has a friend with the same type of trouble I don't think it is admissible, the type of testimony that has been given.

977 The Court: It doesn't make any difference whether the cases he has seen are all friends or strangers. He can refer to his patient as a friend, or refer to him as a stranger, it doesn't make any difference; it shows his experience.

Mr. Fitzgerald: He doesn't say he has examined Mr. Lambra at all.

The Court: He says he came to his office.

Mr. McNamara: May we show he did go into Mr. Lambra's case and learned the history?

978 Witness: He did.

The Court: Go on.

Witness: Now the question, of course, I don't want to act as his attorney, your Honor.

The Court: There isn't any danger of that, Doctor. Go on and tell the jury.

A. (continued) The question in my mind is whether it is a functional thing or not. So, as I say, I have been rather skeptical about

people unless they're absolutely "malingerers," that is a term they use in the army for people trying to make out they're disabled or have some trouble when they haven't; in other words "skrimshankers" which isn't an uncommon ailment in the army and especially after the army. Now as I look on the case, he has apparently nervous seizures. Now the question of their being petit mal I have never seen anyone, and I don't know that anybody else has, but it's an indefinite thing, they lose consciousness for a very short time. For instance they're eating and might drop their fork, and if talking they might stop the flow of their conversation and then go on with it; that is one type. Now I have listened to the evidence of two practitioners who are experienced men Dr. Davidson and Dr. Johnson he saw him in the actual convulsion. Now leaving aside the petit mal, he certainly had actual convulsions because his tongue was bitten and he was unconscious afterwards. Now you cannot imitate that, as is apparently done, but you wouldn't deceive a doctor. You don't bite your tongue and don't void urine involuntarily, as he told me he did,—and two doctors, Dr. Davidson and Dr. Johnson who saw him have a convulsion, and good practitioners saw him. It isn't a question of that man malingering or having hysteria,—a functional attack, as sometimes

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982 they have, but he absolutely had an epileptiform convulsion to my thinking, and I would swear it on a stack of bibles on that evidence, so the whole thing to my thinking is what is the cause of it? He never had convulsions of any kind in childhood. I am not going into the cause of convulsions in childhood but as applies to his case; straight epilepsy is a disease that develops before puberty and very rarely after twenty. Now this boy had convulsions I say he was twenty-five to
983 thirty now the cause for those in a great number of cases is some local lesion in the brain. Now in looking over his case naturally a man in the army, a man who is trying to get his rights, I was thinking what could be the cause of that. He told me he was thrown forty feet, and as I understand he has evidence to prove that; now you take a high explosive shell what they call "big stuff" six, eight, nine inch stuff, going at the speed I wouldn't want to estimate
984 the speed but you have all had experience, most people have with dynamite, and when you think of high explosive it is in the class with dynamite, only more powerful, going with such speed, you can imagine what a terrific shock it is. He was thrown forty feet. Now the brain is not a rigid organ at all and you don't necessarily have to have a fracture of the skull to have an injury that will cause convulsions afterwards. You don't necessarily have even a spicula of

bone tissue in the inner part of the bony cov- 985
ering of the brain to cause a convulsion You might get a pouring out of blood in greater or less degree, and one of the peculiar things about it is this,—that you don't necessarily have a true epileptic convulsion or an epileptiform convulsion until a period of years. For instance, you may get a thickening of the tissues and fibrous tissue forming. You know how a thickening what we call in the country "proud flesh"—how you get a large scar eventually. You might get this scar tis- 986
sue and as time went on, this tissue might contract and cause an irritation to the brain and cause convulsion.

WHEREFORE, the defendant prays that the judgment of the District Court for the District of Vermont may be reversed.

UNITED STATES OF AMERICA,
By Harry B. Amey,
United States Attorney. 987

ALLEN MARTIN,
Assistant United States Attorney.

WILLIAM J. HESSION,
Chief Attorney,
Veterans' Administration.

*Clerk's Certificate.*

988 I hereby assent to the filing of the above additional assignments of errors.

This 17 day of August, 1932.

J. A. McNamara,
Attorney for Plaintiff.

Filed August 17, 1932,
Austin H. Kerin,
Clerk.

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989 **Clerk's Certificate.**

UNITED STATES OF AMERICA.

DISTRICT OF VERMONT.

I, Austin H. Kerin, Clerk of the District Court of the United States, within and for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 331, inclusive, contain a true and correct
990 transcript of the record filed by order of Honorable Harland B. Howe, United States District Judge, in the case entitled:

UNITED STATES OF AMERICA,
Appellant,
(Defendant Below),

vs.

NEWTON W. LUMBRA,
Appellee.
(Plaintiff Below).

as the same remains of record and on file in the office of the Clerk of said Court.

*Clerk's Certificate.*

991 IN TESTIMONY WHEREOF, I have hereunto caused the seal of said court to be hereunto, affixed at the City of Burlington in said District of Vermont, this day of in the year of our Lord one thousand nine hundred and thirty-two and of the Independence of the United States the one hundred and fifty-sixth.

....., Clerk.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 182

Argued December 22, 1932. Decided March 6, 1933

UNITED STATES OF AMERICA, Defendant-Appellant,

v.

NEWTON W. LUMBRA, Plaintiff-Appellee

Appeal from the District Court of the United States for the District of Vermont

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From a judgment for the plaintiff entered on a verdict for $8,912.50, in an action to recover upon a policy of war risk insurance, the defendant appeals. Reversed.

Harry B. Amey, U. S. Atty., of Burlington, Vt., and Allen Martin, Asst. U. S. Atty., of Essex Junction, Vt. (Davis G. Arnold, William J. Hession, and Lawrence A. Lawlor, all of Washington, D. C., of counsel), for the United States.

J. A. McNamara, of Burlington, Vt., and Harold G. Sylvester, of St. Albans, Vt., for appellee.

AUGUSTUS N. HAND, Circuit Judge:

This is an appeal by the government from a judgment in favor of Newton W. Lumbra, who brought action to recover upon a war risk insurance policy. We think the judgment must be reversed, because there was no evidence that on May 1, 1919, when the policy lapsed for nonpayment of premiums, it was reasonably certain that the disability of the insured would continue throughout his life.

From 1917 to 1919 Lumbra was a soldier in the military service of the United States. He testified that he was injured in France during a bombardment by the explosion of a shell, which fell near him while he was on his way back from the trenches to his dugout. He suffered a physical injury to his ankle, and was thrown down and rendered unconscious by the concussion. The explosion occurred on

June 17, 1918. He was taken into his dugout, where he regained consciousness, and afterwards to the hospital, from which he was discharged late in August. Before the explosion he had been in good health. While confined in the hospital, he said that he had "faint, weak spells, dizzy spells—everything go black, and the sweat stand out on me and I would have to sit down." As soon as he had recovered from the injury to his ankle, he went back to his company and was given light work in the kitchen, but the "spells" continued and got gradually worse. After his return to the United States from France and his discharge from military service, which was on April 29, 1919, he went to his mother's house in Vermont, and did nothing for three or four months. He then began to work for the Wilcox Hall Company, rolling logs in their vats. This work was found to be too hard for him, and he was put at something lighter. He lost about half his time because of the dizzy spells, which got worse, and finally in 1921 he was forced to give up this employment. He then went to St. Albans and stayed for some time at a sister's, after which he obtained employment as a machinist's helper with the Vermont Central Railroad. He first worked for the railroad in that capacity, and later as a laborer. This employment with the railroad lasted from June, 1922, for about a year, but he lost considerable time owing to his ailment. In June, 1923, he went to work for the Boston & Maine Railroad, and worked until November, losing considerable time with it because of his condition. He then returned to the Vermont Central and remained with it until February, 1929, but was put at light work, and finally was only able to sweep around the railroad shop and attend to the lavatories. His attacks increased in frequency; and in 1923 they manifested themselves in epileptic seizures, which became so frequent and severe that in 1929 he had to cease all employment. From 1926 Lumbra was in the hospital seven different times from two weeks to two months. There was testimony that the railroad employed him as long as it did because he was an overseas veteran and veterans were specially favored.

Dr. Skeels testified as an expert on behalf of the plaintiff. He said that in his opinion he had "epileptiform convulsions * * * and they were caused by an injury he had from the high explosive. * * *" But there was no

testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled, but none from which they might find that his disability was permanent.

There was evidence on behalf of the defendant that the plaintiff was not subject to epileptic seizures, but that his condition was one of "mixed neurasthenia and hysteria." The defendant also introduced various applications by Lumbra for employment with the Central Vermont Railroad in which he stated that he had no physical defect. The plaintiff's own evidence, however, was substantially as we have stated.

There is no liability for permanent total disability occurring after the lapse of a war risk insurance policy, even though caused by injuries suffered during military service and while the policy is in force. Eggen v. United States (C. C. A.) 58 F. (2d) 616; United States v. McLaughlin, 53 F. (2d) 450 (C. C. A. 8). Liability must be founded upon total permanent disability while the policy is in force.

Total disability is any impairment of mind or body which renders it impossible for the insured to engage continuously in any substantially gainful occupation, and total disability is permanent if it is founded upon conditions which make it reasonably certain that it will continue throughout life. In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation. He testified that he was then subject to spells of dizziness and faintness which prevented continuous work, but there is nothing to show that at that time conditions were such that it could be said with reasonable certainty that he was not likely to recover. Dr. Skeels' testimony that in his opinion the epileptiform convulsions were caused by an injury from the high explosive was no proof that in May, 1919, it was reasonably certain that permanent disability would result from his then condition. Dr. Skeels never said in words or substance that a man having a subsequent bodily history like that of Lumbra was in a condition in May, 1919, that made permanent disability reasonably certain. Nor did any one testify that in May,

1919, the "spells," if arising from the explosion of the shell near the plaintiff would be permanent or would result in epileptic convulsions proximately or ultimately. It is not enough to show that four years after the "spells" began epilepsy supervened. In May, 1919, the plaintiff himself was not aware of any permanent disability, nor apparently was his Physician, Dr. Titus, who treated him in December, 1929, for "rheumatism, chronic branchitis and nervousness." It is not shown that his condition was incurable in May, 1919, merely because it became so years later. For aught we know, various things other than the shock of the explosion may have contributed to the epileptic convulsions, even though the convulsions would not have occurred without it. For a layman or a petit jury to say that Lumbra's supposed brain lesion or other injury caused by the explosion, though sufficient to produce attacks of dizziness and headaches, involved a condition which rendered it reasonably certain that disability would continue during lifetime, is indulging in mere guesswork. They and we manifestly know nothing about it, and the plaintiff's case was not established by proof that epilepsy finally ensued. The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919, were reasonably certain to produce permanent disability. No such evidence was produced, and the plaintiff failed to establish his claim because it was lacking. Eggen v. United States, 58 F. (2d) 616 (C. C. A. 8); United States v. McLaughin, 53 F. (2d) 450 (C. C. A. 8); Blair v. United States, 47 F. (2d) 109 (C. C. A .8). This result is in accordance with the rule laid down in Clapp v. United States (C. C. A.) — F. (2d) —, the opinion in which is filed herewith.

The judgment is accordingly reversed.

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UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 13th day of March, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

NEWTON W. LUMBRA, Plaintiff-Appellee,

vs.

UNITED STATES, Defendant-Appellant

Appeal from the District Court of the United States for the District of Vermont

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Vermont and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Newton W. Lumbra vs. United States. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed March 14, 1933. William Parkin, Clerk.

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UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 336, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Newton W. Lumbra, Plaintiff-Appellee, against United States, Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of June, in the year of our Lord one thousand

nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-seventh.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals, Second Circuit.)

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June 6, 1933.

For cause shown, the time within which a petition for writ of certiorari may be filed is extended until and including June 27, 1933.

Pierce Butler.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.